No. 76-1159

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

ARTHUR F. QUERN, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID and successor in office to JAMES L. TRAINOR and THE ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL.,

Petitioners,

vs.

VENUS MANDLEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ARTHUR F. QUERN, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID and successor in office to JAMES L. TRAINOR and THE ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL.,
Petitioners,

vs.

VENUS MANDLEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, ARTHUR F. QUERN, Acting Director of the Illinois Department of Public Aid and the ILLINOIS DEPARTMENT OF PUBLIC AID, respectfully pray that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 23, 1976.

OPINIONS BELOW

The Opinion of the United States District Court, Northern District of Illinois, Eastern Division, the Opinion of the United States Court of Appeals for the Seventh Circuit in case No. 76-1865 and the Order entered on November 29, 1976, by the United States District Court pursuant to the mandate of the United States Court of Appeals for the Seventh Circuit are not reported, and hence appear in the appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

1. Is a state prohibited from affording any federally funded assistance for emergent needs to AFDC recipients unless the state elects to maintain a 42 U.S.C. §606(e) emergency assistance plan?

2. If a state elects to maintain a 42 U.S.C. §606 emergency assistance plan, is the state permitted to choose what types of destitution it will alleviate or must it provide relief for all types of destitution for all needy children and their families?

3. If a state elects to maintain a 42 U.S.C. §606(e) emergency assistance plan, must it provide assistance within 24 hours in all cases even where verification is impossible or the need not immediate?

STATUTES AND REGULATIONS INVOLVED

Chapter 28 U.S.C. §1254
Chapter 42 U.S.C. §1983
Chapter 42 U.S.C. §601
Chapter 42 U.S.C. §602
Chapter 42 U.S.C. §603(a)(1)
Chapter 42 U.S.C. §603(a)(5)
Chapter 42 U.S.C. §606(e)
45 C.F.R. §233.10(a)(1)(ii)
45 C.F.R. §233.20(a)(2)(v)
45 C.F.R. §233.120(a)(5), (b)(3)

JURISDICTION

The order and opinion of the United States Court of Appeals for the Seventh Circuit were entered on November 23, 1976. This Petition for Certiorari was filed within 90 days of the date of the entry of that Order.[1] This Court's jurisdiction is involved under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioners, Defendants below, promulgated a revised Emergency Assistance Program on October 1, 1973, pursuant to 42 U.S.C. §606(e). The program was further revised and received approval from the United States Department of Health, Education and Welfare (H.E.W.) in

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[1] On January 28, 1977, pursuant to a Petition of Joseph Califano for an Application for a Stay of the Judgment of the United States District Court for the Northern District of Illinois pending disposition of the case by this Court, the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States ordered that the mandate of the United States Court of Appeals for the Seventh Circuit, in case No. 76-1865, be recalled and stayed to and including February 18, 1977. Sup. Ct. A-619.

June, 1974. The program both as originally promulgated and as revised was challenged by the Respondents, Plaintiffs below, as being violative of the Equal Protection Clause, and certain statutory provisions of the Social Security Act and regulations promulgated thereunder.

This Illinois program had provided assistance for certain specified emergency needs to all people who were otherwise eligible for the Aid to Families with Dependent Children Program (A.F.D.C.) 42 U.S.C. §601 *et seq.* The primary aim of the then Illinois plan was to alleviate homelessness which occurred as a result of four emergency situations. The primary thrust of Respondents' complaint was that the plan violated the Equal Protection Clause because it provided emergency assistance to individuals in the four emergency situations, but did not provide assistance to individuals who experienced emergency situations other than the four situations set forth in the plan. Further, Respondents claimed that the State of Illinois was not delivering assistance "forthwith" as required by 45 C.F.R. §233.120. The District Court, after a bench trial, ruled on November 21, 1974, that the revised Emergency Assistance plan was valid under 42 U.S.C. 606(e) and the Equal Protection Clause, but ordered Illinois to amend the program to speed up delivery of the assistance. A final order was entered by the Court on March 14, 1975, directing the Petitioners to alter the assistance delivery system. On subsequent appeal from the two Orders, the United States Court of Appeals for the Seventh Circuit found the Illinois program in conflict with the Social Security Act and therefore invalid by virtue of the supremacy clause of the Constitution. The Court concluded that the Illinois plan was not consonant with the eligibility requirements of §606(e), 523 F.2d. 415 (1975) (*Mandley I*).

On remand the Petitioners informed the District Court that they were unsure as to how next to proceed. However,

in June of 1976, Petitioners informed the Court that they were not going to seek or receive funds pursuant to 42 U.S.C. 606(e) and 603(a)(5) and that they had exercised their option for drop out of the program. Simultaneously, the Petitioners created a "Special Authorization Program",[2] which program was substantially the same as the previous Illinois Emergency Program except that assistance could be provided more often. Permission was received from the Department of Health, Education and Welfare (H.E.W.) to receive federal funds for the program, from funding sources other than 606(e) and 603(a)(5). The Plaintiffs, while objecting to the new funding scheme, nevertheless refused to amend their complaint to challenge the changed funding scheme. After numerous hearings, the District Court, on July 12, 1976, granted Defendants' Motion to Dismiss the Cause for Mootness and for a Lack of Case or Controversy.

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[2] There are four specific emergent need situations for which Special Assistance may be authorized. The four emergent situations are as follows:

(1) *Homelessness:* The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable, as in a fire or flood.

(2) *Court Ordered Eviction:* The AFDC family is rendered homeless because of a court ordered eviction for reasons other than failure to pay rent. Moving costs *only* may be authorized.

(3) *Potentially Homeless:* The AFDC family is potentially homeless due to damage to a portion of the building or its contents.

(4) *Applicant in need at point of initial eligibility:* An AFDC client either determined eligible or presumed eligible for AFDC in dire need of clothing and/or household furnishings and equipment.

On appeal, *Mandley* v. *Trainor,* No. 76-1865 (*Mandley II*), the Appellate Court reversed the District Court and "*sua sponte*" directed that Plaintiff's proposed Final Judgment Order of November 26, 1975, be entered.

The Appellate Court stated:

> We hold that the Illinois defendants cannot avoid the eligibility requirements of Section 406(e)(1) by relabeling the plan as part of AFDC under Section 402 while still receiving 50 per cent federal funding for what is really Section 406(e)(1) emergency assistance to children.
>
> Stripped to the bone, our holding is founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs under Part A of Subchapter IV. Slip Opinion p. 11. (Appendix no. 2)

REASONS FOR GRANTING THE WRIT

The effect of the ruling in *Mandley I,* in the eyes of the State defendant, was to prevent the State from operating a fiscally sound federally funded Emergency Assistance program pursuant to §606(e).[3] The State thus felt that it could not afford to create a federally funded program to meet emergent needs for destitute children both receiving and not receiving AFDC. However, the State defendant believed that it could still provide assistance to AFDC recipients in emergent need by the design of specific special needs programs which would be funded federally under provisions of the Social Security Act other than 45 U.S.C. §606(e) and §603(a)(5). The administrative and financial problems created by the *Mandley I* ruling could thus be avoided by avoiding §606(e) itself without reduction of federally funded assistance to AFDC recipients.

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[3] The financial problem created by *Mandley I* is acute. Where all persons within a large class are deemed eligible and where the State is prohibited from covering selected emergent situations but must alleviate all destitution, the number of potential grants is enormous. The Court of Appeals stated that the State could nonetheless reasonably limit the amounts paid out, presumably by adjustment of benefit levels. But if the State were to retain the program, it would naturally have to cover those greatly increased number of newly eligible cases, thus either vastly increasing expenditures or radically cutting the size of the individual grant. At some point an emergency system with small grants becomes useless, as when you give $15.00 to a family with no place to live. Mandatory broad eligibility prices the program out of existence or out of reason. HEW has stated in its Application for a Stay that Wisconsin and Arkansas are no longer giving emergency assistance because of the financial problem.

The ruling in *Mandley II,* however, builds upon these administrative and financial problems created by *Mandley I* and compounds them in a way that directly effects the State and its AFDC recipients. The net result is a thwarting of the very purpose for which the AFDC program was designed, namely, to allow the use of a combination of state and federal monies to assist impoverished children and their families.

Mandley I articulated the view that 42 U.S.C. §606(e) is a monolith that must be accepted in toto or rejected. If the State choses to have a federally funded §606(e) Emergency Assistance program, the Court of Appeals stated that the program must cover all the persons identified therein, relieve all forms of destitution for all those persons, and must do so "forthwith". *Mandley II,* and the Order which the mandate of the Court of Appeals directed to be entered, show that "forthwith" is considered to be 24 hours from time of request to delivery of assistance. Even assuming the absence of other administrative problems and weekends, such a time frame obviously does not allow time for any adequate verification of need or eligibility. The Court of Appeals has thus effectively decided that the furnishing of assistance in any emergent situation must be subject to no administrative constraints.

Were *Mandley II* only to have gone this far, the effect upon the State would have been sufficiently onerous. The State, already by *Mandley I* being unable to control or predict the size of cost of a §606(e) program through selection of needs to be met, would now not even have time to verify the existence of the need. Such a system alone would have been administratively irrational.

Yet *Mandley II* went even further and required that any federally funded form of assistance which met emergent need must be operated within the unadministerable framework set up by the Court's decision and Order for §606(e) programs. The State, under such a ruling, must insure that any special needs it currently grants or contemplates granting do not smack of satisfying emergent need lest the federal financial participation therein be deemed illegal. The effect of this ruling is thus to diminish the situation in which the federal government pays 50% of the AFDC program. Either the State will be forced to increase its percentage of payment or it will be forced to reduce the size and content of its program. Both of these results are contrary to the intent of the Social Security Act.

Mandley II thus makes clear that the Court of Appeals has erred in its entire view of the purpose of the legislation. These results which thwart the statutory purpose stem directly from the misconception that the State must either accept or reject §606(e) in toto. Were the state free, as Congress intended, rationally to select those emergent needs it wished to meet, funded either under §603(a)(1) and §603(a)(5) for recipients or exclusively under §603(a)(5) for nonrecipients, the statutory intent of the AFDC program would be served, not blocked.

This decision thus involves important questions of federal law which have not been settled by this Court and which should be settled by Review on Certiorari.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN FAILING TO AFFIRM THE DISTRICT COURT'S DISMISSAL FOR MOOTNESS SINCE THE STATE DEFENDANT HAS CEASED REQUESTING REIMBURSEMENT FOR AN EMERGENCY ASSISTANCE PROGRAM CREATED PURSUANT TO 45 U.S.C. §§603(a)(5) AND 606(e).

After the *Mandley I* ruling that the State defendant could not maintain its existing Emergency Assistance plan and continue receiving 606(e) funding, the State defendant applied to HEW for funding of a substantially similar special needs plan, to be funded under another provision of the statute. With the elimination of the 606(e) plan, the case was moot and recognized as such by the District Court. The Court of Appeals erroneously reversed such decision on the basis that any plan, no matter how titled or funded, which met emergent need was by definition a 606(e) plan. There is no statutory basis for such a conclusion. The provisions of 42 U.S.C. §603(a)(1) are by statutory design of extreme breadth, intended to allow each state to create specific programs to meet special needs. Plans which meet emergent needs pursuant to §603(a)(1) are designed to be more liberal than plans which meet emergent need pursuant to §606(e) since 606(e) assistance is limited to issuance during one month out of twelve, 45 C.F.R. §233.120(b)(3) while §603(a)(1) assistance allows more frequent issuances. The Opinion of the Court of Appeals in no way demonstrates a statutory prohibition against creating special needs plans for meeting emergent needs pursuant to §603(a)(1).

The sole basis for the Court's ruling is that the actions of the state defendants would prevent the result that the Court of Appeals had sought in *Mandley I.* No relevant provisions from the Social Security Act, the regulations, or relevant cases are cited in opposition to the legal position of the defendants. To the contrary, the Secretary of H.E.W. in his analysis of this situation, directs the Court's attention to 45 C.F.R. §233.20(a)(2)(v) (application 619, p. 3). That regulation specifically permits a State agency to include special need items in its standard. That regulation permits the description of circumstances for which the State will provide benefits as long as those benefits are available to all recipients and applicants.

The result of the erroneous refusal to affirm the mootness decision by the Court of Appeals has grave implication for the Defendants and for all other state welfare systems and their recipients. The decision as written prohibits the federal funding of existing special needs programs created pursuant to §603(a)(1) if those programs meet emergent need. The federal defendant in its Application for a Stay of the Judgment has shown that a potential thus exists for a cutoff of federal funding from all special issuance programs. The result of such a cutoff would be either a significant burden upon state budgets or a diminution in welfare payments.

II.

THE COURT OF APPEALS ERRED IN DIRECTING THE ENTRY OF AN ORDER WHICH REQUIRED THE STATE DEFENDANT TO FILE A 606(e) PLAN WHICH WAS TO INCLUDE ALL DESTITUTE CHILDREN AND WHICH WAS TO ALLEVIATE ALL FORMS OF DESTITUTION.

A. THE SOCIAL SECURITY ACT DOES NOT PROHIBIT THE STATE FROM CREATING A §606(e) EMERGENCY ASSISTANCE PLAN WHICH PROVIDES ASSISTANCE FOR ONLY CERTAIN SPECIFIED EMERGENT NEEDS.

The order which, at the express direction of the Court of Appeals, has been entered by the District Court Judge, enjoins the State defendant:

> "From using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of §406(e) . . . [42 U.S.C. 606(e)]"

The Order thus clearly precludes the State defendant from specifying certain federally fundable emergency needs and not meeting other federally fundable emergency needs in a 606(e) plan. Such preclusion is not consonant with the statutory design. The Order is based upon the reasoning that §606(e) constituted the establishment of eligibility criteria for the 606(e) emergency assistance system. All persons listed in these statutes as assistable, under this reasoning, must be assisted, and all assistance which can be given must be given. But §606(e) is not an eligibility provision. It is but a definitional section (its title is "Definitions") articulating what emergency assistance means. There is no question that forms of assistance which do not meet these definitions cannot be federally reimbursed under §603(a)(5). But there is neither authority nor logic to the Court of Appeals' conclusion this statutory framework which sets out the outer limits of federal fundability establishes mandatory eligibility criteria. To the contrary, a state may construct an emergency assistance program containing various elements, particular destitutions, which are within the definitional scope of §406 and having chosen those elements must effectively alleviate the destitution. *Purnell* v. *Edelman,* 365 F. Supp. 499 (N.D.Ill. 1973), aff'd in part 511 F.2d 1248 (C.A. 7 1974).

The entry of the Order which enjoins the state from creating a §606(e) emergency assistance program with less than the maximum permissible particular destitutions is in error.

B. THE ORDER IMPOSES ADMINISTRATIVE BURDENS ON THE STATE DEFENDANT WHICH PREVENT RATIONAL ADMINISTRATION.

Should the State defendant desire to take the financial risk of creating a §606(e) program of the scope ordered below, it still could not rationally embark upon the program because of the administrative quagmire the Order mandates. Among other mandated duties, the Department would have to furnish assistance within 24 hours of request. Adequate verification would thus be impossible. The Order takes no cognizance of the fact that speed is not always necessary even from the client's viewpoint. If a man tells a caseworker today that he will be evicted if he fails to make a rent payment next week, there is no rational basis for insisting that he have the money tomorrow. Such a wooden approach to administration demonstrates the unreasonableness and unworkability of the Order. It is certainly contrary to the statements of this Court in another Section 1983 action that principles of federalism should keep the federal judiciary from limiting a governmental department's "latitude in the dispatch of its own internal affairs". *Rizzo* v. *Goode*, 423 U.S. 212, 96 S.Ct. 598, 608 (1976).

C. THE ORDER SUBJECTS THE STATE TO NEEDLESS CONTEMPT PROCEEDINGS.

The Order specifically directs the State defendants to file a detailed §606(e) Emergency Assistance plan. The State defendants ceased claiming federal funding for any assistance given under the program that was the subject matter of the lawsuit. The State defendants believed that unless and until they wished to claim federal funds for emergency assistance that they had no obligation to file an §606(e) plan, the Court of Appeals having ruled that there was no necessity for the Defendants to maintain any federally funded emergency assistance program.

The Plaintiffs, however, have sought in the District Court to have State defendants cited in contempt for their failure to file such a plan. Again, the inconsistency and the illogic of the Order is apparent. The State defendants require from this Court relief from the necessity of appearing in the District Court to answer the Request for a Rule to Show Cause.

CONCLUSION

The Decision and Order in the instant case require that a state forego all special programs for meeting emergent need for A.F.D.C. recipients unless assistance is provided pursuant to 42 U.S.C. 606(e) for all needy children and their families for all forms of destitution. The effect of such a decision will cause either substantially less federal funds to be available for the state welfare programs (if the states do not establish §606(e) programs) or greater state and federal expenditures for programs not susceptible to adequate verification. The case thus presents such important questions of federal law which have not yet been but which should be settled by this Court. Wherefore the Defendants pray that this Honorable Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

10:30

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,

Honorable THOMAS R. McMILLEN

Cause No. 73 C2453

Date July 12, 1976

Title of Cause Mandley v. Trainor

Defendant's motion to dismiss for mootness is granted, and this cause is dismissed for lack of case or controversy.

Thomas R. McMillen

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1865

VENUS MANDLEY, et al.,
Plaintiffs-appellants,

v.

JAMES L. TRAINOR, et al.,
Defendants-appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 73 C 2453—Thomas R. McMillen, *Judge.*

HEARD NOVEMBER 4, 1976—DECIDED NOVEMBER 23, 1976

Before CUMMINGS and TONE, *Circuit Judges,* and CAMPBELL, *Senior District Judge.*[*]

CUMMINGS, *Circuit Judge.* This appeal is a sequel to the proceedings discussed in our earlier opinion reported in 523 F.2d 415 (1975) (*Mandley I*). There we held that

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[*] Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

the Illinois Emergency Assistance Program for needy families with children defined eligibility more narrowly than Section 406(e)(1) of the Social Security Act (42 U.S.C. §606(e)(1) and therefore violated the Act. Our mandate was returned to the district court on October 24, 1975.[1] On November 26, the plaintiffs submitted a proposed final judgment and decree disposing of the controversy. A few days thereafter the state defendants filed a motion to dismiss the cause of action on the ground that on November 21, 1975, Illinois had withdrawn from participation in the Emergency Assistance Program established under Section 406(e). They did not inform the Court that they intended to carry on virtually the same program[2] under a different name but still with the usual 50 per cent federal funding as part of their regular Aid to Families with Dependent Children (AFDC) program. The record shows that this new plan was to avoid our September 25 decision and was conceived as early as November 17, 1975, and formally presented to HEW on April 23, 1976, but effective January 1, 1976. However, on November 18, the state defendants misled the Court by asserting that only state funding would be employed.

---

[1] In December 1975, the Department of Health, Education and Welfare requested and received an extension of time in which to petition the Supreme Court for certiorari. However, no petition for certiorari was ever filed. In January 1976, the Department sought to have us recall our mandate on the ground of mootness but we denied its petition on January 30, 1976.

[2] In a letter dated March 9, 1976, from Director Trainor of the Illinois Department of Public Aid to the Legislative Advisory Committee on Public Aid, Trainor revealed:

> "the special needs program we substituted affords the virtually same benefits and employs the delivery system we were using prior to the Court's ruling that our program was not in accord with S406(e) of the Social Security Act. Thus, there has been no effect upon the recipients * * *."

HISTORY OF EMERGENCY ASSISTANCE AFTER *Mandley I*

In order to understand how the state defendants have vacillated between affected compliance with *Mandley I* and a final blatant disregard of the congressional eligibility requirements enforced thereby, it is necessary to trace the history of emergency assistance in Illinois after that decision became final.

At the November 17, 1975, meeting of the Illinois Legislative Advisory Committee on Public Aid, defendant Trainor submitted the recommendation dated October 30, 1975, of his Department to "Eliminate [42 U.S.C.] 606(e) Program and Create a Program for Meeting Emergent Burnout Cases to be Funded Under Section 602 and Section 603." After consideration of the Department's proposal, the Committee endorsed the Department's recommendations and requested that the Department report back to the Committee "at its April 1976 meeting with the results of this program and [its] recommendations to handle other special emergency needs which may not have been met."

In its October 30 position paper, the Department indicated that "[e]liminat[ion] [of] the 606(e) Emergency Assistance Program" was out of the question:

> "The Department, although believing this [eliminating] alternative to be legally acceptable, finds this alternative totally unacceptable. The Department believes that certain Emergency conditions, such as homelessness through burn outs are needs which the Department of Public Aid clearly ought to meet and the Department would not wish to curtail its ability to do so."

"[O]fficial notification to the Department of Health, Education and Welfare that Illinois shall not request reimbursement pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e)) for any expenses incurred after November 21, 1975, as the Department is terminating its program for 'Emergency Assistance to Needy Families with Children' existing pursuant to said § 406(e)" was given by the Department of Public Aid in a November 21, 1975, letter to HEW.

On April 23, 1976, the state defendants submitted a plan to HEW (Joint Appendix 21-132—21-140) that was consistent with this notification of November 21. The April 23 plan, discussed *infra*, is the one now in effect.

On April 26, 1976, before another meeting of the Legislative Advisory Committee on Public Aid, Trainor indicated that the Department would assent to a broader emergency assistance program to alleviate destitution:

> "After July 1, 1976, the program would be an a six-month trial basis. It would broaden the emergency needs to include persons to whom destitution exists or to whom destitution is threatened, and remedy any cause of destitution" (Tr. at 40).

On May 3, 1976, in a report to the Court, defendants averred that the:

> "Department will in all probability choose to apply for funding pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e) *et seq.*), when it has completed designing such an emergency assistance program and will submit the necessary State plan amendments to the Department of Health, Education and Welfare."

In the same report, defendants stated they were not "presently claiming any funds under § 606(e)."

In a May 12 report to the Court, defendants submitted a proposed plan which laid out eligibility requirements at least colorably consistent with Section 406(e)(1). At a May 17, 1976, meeting of the Legislative Advisory Committee, Representative Mann indicated that the implementation date of the broadened plan would be advanced from July 1, 1976, to April 1, 1976.

On May 19, 1976, HEW filed its comments on the May 12 plan. Acknowledging that the new plan "differs radically from the old emergency assistance program," HEW noted:

> "It is the Secretary's understanding that the plan description is merely a report to the Court concerning the present state of the Director's thinking concerning a new Illinois emergency assistance program. *When and if, that thinking crystalizes and is embodied in a completed plan, that plan will be submitted to the Secretary for approval. Until that time, the Secretary can have no formal views on the acceptability of any plan that the Director may be considering.*" (Emphasis supplied.)

Because of the broadened eligibility requirements, the plaintiffs believed that the "objections to the earlier plan [they] intended to file on May 19, 1976 [might] be unnecessary either in whole or in part," although the plaintiffs reserved the right to file objections to the amended plan.

On June 14, the Legislative Advisory Committee approved a plan with the following eligibility requirements:

> "Recipients of AFDC, AABD, GA (in units administered by the Department) and persons who could be found presumptively eligible for such programs, including any needy child under 21 and the specified relatives with whom he is living. An additional condition of eligibility is that the persons must be destitute or immediately threatened with destitution."

This plan, by its own terms, sought reimbursement, at least in part, pursuant to Section 406(e).

On June 16, 1976, the plaintiffs were served with a June 15 notice of filing in the district court of the same liberalized Emergency Assistance Program, "which in part will employ § 406(e) emergency assistance funds," that the Legislative Advisory Committee had approved on June 14. Curiously, on June 17, 1976, counsel for the State informed the plaintiffs that he had been ordered not to file the new plan. The next day, the State filed a report of status which averred that the State would not "formulate or implement any Emergency Assistance Program which in part or in whole employs federal funds pursuant to Section 406(e) of the Social Security Act." Perhaps counsel for the State was inadvertently confirming the classic Shakespearean lesson on semantics: "What's in a name? That which we call a rose by any other name would smell as sweet." (*Romeo and Juliet,* Act I, Scene v.) At any rate, that June 14 plan was never filed in court.

The plan submitted to HEW on April 23, 1976 (Joint Appendix 21-132—21-140) was virtually the same plan as that declared illegal in *Mandley I.* Even in its brief here, Illinois lists only two minor changes in the plan submitted to HEW, neither of which has any relevancy to broadened eligibility requirements.[3] The liberal plan worked out between the April 26 and June 14 Legislative Advisory Committee hearings which HEW felt "radically different" from the pre-*Mandley I* plan has never been submitted to HEW as far as can be determined from the opaque record before us.

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[3] See Note 6 *infra.*

Rather the plan submitted to the regional office of HEW on April 23, 1976, was a program with eligibility requirements which were identical in all material particulars to the pre-*Mandley I* program. Thus on July 12, 1976, when the district judge declared the case moot, the only change with respect to the Illinois Emergency Assistance Program funded by HEW was that the source of funding had been switched from Section 403(a)(5) to Section 403(a)(1). Most importantly for our purposes, the scope of the program's eligibility requirements was identical to that of the eligibility requirements declared illegal in the pre-*Mandley I* plan.

The end result is succinctly detailed in a June 1, 1976, colloquy between the district judge and plaintiffs' counsel:

> "The Court: But I don't think, as I get it, nobody is being deprived emergency assistance, although they may not get it under Section 606(a) [sic, 606(e)].
>
> "Mr. Lefkow: That is not correct, your Honor. Many, many people are being deprived of emergency assistance." (Tr. at 8)

DISMISSAL OF ACTION

On December 9, 1975, the defendant Secretary of Health, Education and Welfare filed a motion to dismiss on the ground of mootness. The state and federal motions to dismiss were answered by plaintiffs and denied by Judge McMillen on December 31, 1975, and he ordered the defendants to file objections to the plaintiffs' proposed final judgment and decree within three weeks. Such objections were filed by the state defendants on January 21, 1976, and by HEW on the following day but never ruled upon.[4] Instead, after plaintiffs declined to amend their complaint further, the district judge dismissed the cause for mootness and for lack of case or controversy on July 12, 1976. This appeal followed. We reverse.

STRUCTURE OF SUBCHAPTER IV OF THE SOCIAL SECURITY ACT AS IT RELATES TO FUNDING OF AID PROGRAMS.

In order to appreciate the funding of "emergency assistance" programs, it is necessary to outline briefly the structure of Subchapter IV funding. Section 401 authorizes the Congress to appropriate for each fiscal year a sum sufficient to carry out the general purposes of Part A of Subchapter IV—Aid to Families with Dependent Children. The sums so appropriated are made available to states which have submitted AFDC plans. Only states whose plans have been approved by the Secretary of Health, Education and Welfare may receive federal funds. The criteria for approval and the mechanics of approval are set forth in Section 402.

Once a state AFDC plan has been approved, Section 403(a) directs the Secretary of the Treasury to pay funds to the state from the funds appropriated under the authority of Section 401. Subsections (1)-(5) of Section 403(a) describe the various formulae used to calculate the actual dollar amounts to be paid. Since Section 403(a) actually directs the payment of funds, it is the section of

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[4] In order to force a district court decision so that they would then have a final order for purposes of appeal to this Court, plaintiffs asked us in March 1976 to mandamus the district court to decide whether or not to enter the plaintiffs' final judgment. We denied plaintiffs' petition for mandamus on March 31, 1976.

Part A which should be referred to as the "funding" provision of Part A. Section 403(a)(5) provides that the Secretary of the Treasury shall pay 50 per cent of a state's expenditures for "emergency assistance" to needy families with children. It is the only part of Section 403(a) dealing with "emergency assistance."

THE DEFENDANTS' FRAMING OF THE MOOTNESS ISSUE

At the time of *Mandley I,* the state defendants were receiving emergency assistance funds under Section 403(a)(5). These funds were expended under the State's plan as "emergency assistance to needy families with children" as defined by Section 406(e)(1).

We are now advised that Illinois has ceased receiving funds pursuant to Section 403(a)(5) with the attached "strings" of Section 406(e)(1). Instead the State is receiving federal funds for emergency assistance under its regular AFDC plan pursuant to Section 403(a)(1). Since Section 403(a)(1) does not on its face include the term "emergency assistance to needy families with children," the State argues that the funds expended under Section 403(a)(1) no longer come with the attached "strings" of Section 406(e)(1). Defendants argue that the mandatory application of Section 406(e)(1) eligibility standards to the states announced in *Mandley I* occurs only if federal funding is received pursuant to Section 403(a)(5). Their argument concludes that since funding is now received only under Section 403(a)(1), the case is moot. Plaintiffs counter by alleging a circumvention of *Mandley I* by this change in funding.

SCOPE OF THE PRESENT CONTROVERSY

As a threshold matter, we must consider whether the plaintiffs' pleadings are broad enough to permit us to decide whether the defendants' change of funding is an artifice to avoid the *Mandley I* mandate. The amended complaint is an action brought to secure rights established by Section 406(e)(1) of the Social Security Act. Those are the rights that plaintiffs will seek to vindicate. The developments that took place after *Mandley I* were covered by the federal and state defendants' motions to dismiss, the plaintiffs' answer thereto, and the supporting documents filed by the respective parties. The very issue now before us was thus submitted and before the district court without the need of further amendments to the complaint.

This case is not moot, for the state defendants are still operating an emergency assistance program with matching federal funds, although under the guise of a "special assistance" program.[5] There is a live case or controversy because plaintiffs maintain that the state defendants must still comply with the standards of Section 406(e)(1) as long as federal funding is used for this program, while the state and federal defendants remain juxtaposed against plaintiffs.

WHETHER SECTION 406(e)(1) "STRINGS" ATTACH TO EMERGENCY ASSISTANCE REGARDLESS OF FUNDING.

The effect of Section 1318. Before reaching the ultimate issue—whether Section 406(e)(1) "strings" attach to emergency assistance regardless of funding—we must verify whether the present funding actually occurs under Section 403(a)(1). This is because HEW has recently informed us that the federal funding is solely under 42 U.S.C. § 1318. Section 1318 provides in pertinent part:

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[5] Since we answer the issue of mootness at this fundamental level, we need not pass on the plaintiffs' answer to the defendants' motions to dismiss on grounds of mootness wherein they allege that "defendants intend by a technical maneuver to suspend temporarily requesting funds under § 406(e), to persuade this [district] court to dismiss the case as moot based on that suspension, and once the case is dismissed to return to § 406(e) funding without any prohibitions, injunctive or otherwise, from this [district] court." (Plaintiff's Memorandum in Opposition to Motions to Dismiss, December 17, 1975, at 5).

> "In the case of any State which has in effect a plan approved under subchapter XIX of this chapter for any calendar quarter, the total of the payments to which such State is entitled for such quarter, and for each succeeding quarter in the same fiscal year (which for purposes of this section means the 4 calendar quarters ending with June 30), under paragraphs (1) and (2) of section * * * 603(a), * * * of this title shall, at the option of the State, be determined by application of the Federal medical assistance percentage (as defined in section 1396d of this title), instead of the percentages provided under * * * such section, to the expenditures under its State plans approved under * * * part A of subchapter IV of this chapter, which would be included in determining the amounts of the Federal payments to which such State is entitled under such section, but without regard to any maximum on the dollar amounts per recipient which may be counted under such section."

This provision as it relates to Section 603(a) (Section 403(a) of the Social Security Act) was added in 1968 by the Social Security Amendments of 1967. 1 U.S. Code Cong. & Admin. News 1042 (1967). The 1965 provision it amended was itself put in the Social Security Act merely to:

> "permit any State which has in effect a plan approved under the new title XIX [Medicaid] to claim Federal participation in its expenditures under all of its Federal-State public assistance programs by application of the new formula contained in title XIX instead of using the varying formulas in the existing titles." 1 U.S. Code Cong. & Admin. News 2265 (1965).

Indeed Section 1318, by its own terms, acknowledges that the entitlement for funding payments is still provided under Section 603(a) (Section 403(a) of the Social Security Act). Thus the interaction between Section 603(a) and 1318 preserves the former's status as the funding provision with the effect of the latter here to maintain the same 50 per cent federal and 50 per cent state ratio of funding that exists for emergency assistance to needy children under Section 403(a)(5) of the Act. At any rate, even if the funding were now solely under Section 1318, HEW states that "does not materially change the argument of the appellee [HEW]" (Nov. 1, 1976, HEW motion to correct its brief). The state defendants have not mentioned Section 1318 orally or on brief, evidently also realizing it does not change their position. As with emergency assistance funding under Section 403(a)(5), Illinois receives a 50 per cent federal share for its AFDC program under Section 1318 alone or in combination with Section 403(a)(1).

The Ultimate Issue. The state defendants admit that they are conducting the same program under the label "special assistance" that they formerly conducted under the label of emergency assistance, with minor exceptions.[6]

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[6] At HEW's suggestion, effective October 12, 1976, the state defendants removed the restriction limiting special assistance payments to once in any 12 consecutive months. Simultaneously, they no longer authorized the payment of moving costs as a result of court-ordered eviction. AFDC Manual, Release No. 76.46 (October 12, 1976), amending Manual Chapter 600.

Illinois contends that the service it formerly gave under Section 406(e)(1) as emergency assistance to needy families with children is now given under Section 402 as part of aid to needy families with children. Instead of seeking federal funding for the program under Section 403(a)(5) authorizing the Secretary of Treasury to pay 50 per cent of the total amount expended by a state under its plan for emergency assistance to needy families with children, the state defendants assert that they now obtain federal funding under Section 403(a)(1) providing that the Secretary of the Treasury pay each state which has an approved AFDC plan certain amounts as computed thereunder. We hold that the Illinois defendants cannot avoid the eligibility requirements of Section 406(e)(1) by relabeling the plan as part of AFDC under Section 402 while still receiving 50 per cent federal funding for what is really Section 406(e)(1) emergency assistance to children.

Stripped to the bone, our holding is founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs under Part A of Subchapter IV. Section 406(e)(1), edited for present purposes, provides:

> "The term 'emergency assistance to needy families with children' means any of the following [furnished during a defined time period to people meeting defined eligibility standards]—
>
> "(A) money payments, payments in kind, or such other payment as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

> "(B) such services as may be specified by the Secretary;
>
> *but only with respect to a State whose State plan approved under Section 602 [Section 402 of Social Security Act] of this title includes provision for such [emergency] assistance.*" (Emphasis supplied.)

Clearly the State has the option of whether or not to include a provision in its state plan in order to receive federal funding under Section 403(a)(5) for Section 406(e)(1) emergency assistance. The legislative history of Section 406(e) reinforces this reading of the statute. As the Senate Finance Committee's report stated:

> "a new program optional with the States would authorize dollar-for-dollar Federal matching to provide temporary assistance to meet the great variety of situations faced by needy children in families with emergencies." 2 U.S. Code Cong. & Admin. News 2838 (1967).

But the fact that a State has the option of whether or not to claim federal funding under Section 403(a)(5) for Section 406(e)(1) emergency assistance is totally distinct from the question of whether a state has the option to choose whether to receive federal funding for emergency needs under Section 403(a)(5) or 403(a)(1). We conclude the state does not enjoy such an option.

HEW's principal argument is that Section 403(a)(5) merely provides an additional source of monies for state emergency assistance plans. The total amount of funds appropriated in a given year for AFDC by the Congress is allocated according to the applicable formula in Section 403(a)(1). In any given year, the Section 403(a)(1) formula would determine a fixed dollar amount. Thus to the extent that federal funding for a "special assistance" program is sought from the total amount of monies in a year allocated to fund Section 403(a)(1) AFDC programs, these other programs presumably would be reciprocally limited. Since Section 403(a)(5) draws on a different block of the funds appropriated for emergency assistance in any given year, a similar limiting tension would not exist on state emergency programs funded under Section 403(a)(5). In this sense, Section 403(a)(5) funding is "additional." But by underscoring these funding subtleties, HEW has shown why Section 403(a)(5) should be construed as the exclusive funding provision for emergency assistance. The 1967 amendments were introduced to correct the unsatisfactory delivery of state emergency assistance. Those amendments would be undermined if HEW's construction were permitted to create this limiting tension on Section 403(a)(1) AFDC funds while the Section 403(a)(5) block of funds appropriated by Congress for emergency assistance in a given fiscal year lies unused.

When Congress added the emergency aid for children provisions to the Social Security Act in 1967, Senator Curtis explained them on the floor of the Senate (113 Cong. Rec. 36319 (1967)):

> "Now, Mr. President, I should like to refer to another new provision in this measure. *For the first time, the Federal Government will match money for emergency assistance. This has not been in the law before.* For a period of 30 days, emergency assistance can be paid in cases where they cannot meet other qualifications. Many of the States have asked for this provision, and it is one that should be looked at by those who say they will reject this bill because it is not liberal. It would do many of the things for which States, welfare directors, and others have been asking for a long time." (Emphasis supplied.)

Speaking directly after the acceptance of the Conference Report by the Senate, Senator Mansfield indicated the 1967 amendments' scope as follows (113 Cong. Rec. 36925 (1967)):

> "Families with emergency trouble will be able to receive emergency assistance in whatever form it is best for them at their time of need. Families which have been burned out, suffered personal tragedies and such will be able to get money, medical care, shelter provided, food sent in, or whatever else is needed to deal with the crisis. The committees are to be commended for adding this provision, thus recognizing that emergencies which strike families cannot be dealt with by business-as-usual methods.
>
> "Sometimes emergencies which strike families reveal deep-seated problems which establish that the children are in danger of exploitation or abuse. Under the legislation, States are required to have, in advance, plans to deal with these situations. This means working closely with the courts and being prepared, when necessary, to find places for children removed from the home by the courts. For these children, previous provisions have been inadequate. Under the new legislation, the financing will be sufficient to assure that the child may be placed in a safe place with the Federal Government paying its share of the cost."

The tenor of these remarks shows the importance of the program and that participating states would have to provide a plan approved by HEW. Emergency assistance was meant to supplement normal AFDC payments. As the Senate Finance Committee reported:

> "The Committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are cut-off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today." (2 U.S. Code Cong. & Admin. News 3002 (1967)).

The federal regulations require that "emergency assistance will be given forthwith" (45 C.F.R. Section 233.120(a)(5)), but Congress provided in Section 406(e)(1) that emergency assistance should be furnished only once in any 12-month period. It is thus apparent that regular AFDC public assistance was administratively and congressionally distinguished from emergency assistance, which is a one-time grant to "avoid destitution" (Section 406(e)(1)). As we held in *Mandley I,* relying in part on additional legislative history, Congress intended the eligibility provisions of Section 406(e)(1) to be mandatory on states giving emergency assistance. 523 F. 2d at 420-423. To like effect, see *Williams* v. *Wohlgemuth,* 540 F.2d 163 (3d Cir. 1976); Note, Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families with Children, 60 Corn. L. Rev. 879, 886-891 (1975) (hereinafter cited as Cornell Note). In our view, the synergistic sum of all these factors results in the conclusion that Congress intended Section 403(a)(5) to be the exclusive source of federal funding in Part A of Subchapter IV of the Social Security Act for the Section 406(e) emergency assistance needs of the citizens of the states.

Illinois cannot evade the Section 406(e)(1) eligibility requirements by relabeling its emergency assistance program as AFDC "special assistance" while still obtaining matching funds from the federal government. See *Youakim* v. *Miller,* 425 U.S. 231.[7] If that were permissible by a mere change in nomenclature, the requirements of Section 406 (e)(1) would be totally eviscerated.[8] Therefore, if Illinois continues to accept federal funds for its "special assistance" program, the guidelines established by Congress in Section 406(e)(1) must be met (*Williams* v. *Wohlgemuth, supra,* at 170 n. 37; *Lynch* v. *Philbrook,* .... F.Supp. ...., ... (D. Vt. 1976)), and HEW must continue to provide half the funding under Section 403(a)(5), as it formerly did with respect to Illinois.

We may take note that state funds available for expenditure on welfare programs are tightly limited. The Senate Finance Committee's report shows that through emergency assistance Congress meant "[t]o encourage public welfare agencies to move promptly and with maximum effectiveness in [emergency situations]." 2

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[7] In discussing *Youakim,* HEW has recognized that for a foster care plan to be funded under Section 403(a)(1) or 1318, it must meet the inclusion requirements in Section 408 (Br. 11). Similarly here, even if an emergency assistance plan (by whatever name) is funded under Section 403(a)(1) or 1318, it must meet the eligibility requirements of Section 460(e)(1). In the words of another metaphor of the same genus, whatever Illinois presently dubs its emergency assistance plan, "a rose is a rose is a rose."

[8] The *amici curiae,* various private charities, state in their brief that if this were

> "successful, [Illinois] would make permanent the transfer of the burden of providing for most emergencies to the private social welfare organizations in violation of the basic principles of both federal and state welfare policy."

U.S. Code Cong. & Admin. News 3003 (1967). Congressman Mills noted in the debates that with emergency assistance, the House believed "that encouraging the States to move quickly in family crises, supplying the family promptly with appropriate services, would in many cases preclude the necessity for the family having to go on [AFDC] assistance on a more or less permanent basis." 113 Cong. Rec. 23054 (1967). Funding with Section 406(e)(1) eligibility requirements for emergency assistance requires the states to meet the needs of a broader class of individuals. Cornell Note, *supra,* at 883, 884. The total state share, assuming maintenance of the present level of benefits,[9] for funding emergency needs when the federal matching share comes under Section 403(a)(5) would normally be larger than if the federal funding comes under AFDC Section 403(a)(1) (whether singly or in conjunction with Section 1318), a provision ostensibly free of the Section 406(e)(1) eligibility requirements. Congress would be thwarted in its aim to encourage the provision of emergency relief to those children whom it intended as targets if a state had the choice of claiming emergency assistance funds under Section 403(a)(1) for AFDC without the "strings" of Section 406(e)(1).

RELIEF

This case concerns emergency needs of people in dire straits. Yet over three years have passed since the filing

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[9] Of course, the level of state benefits does not have to remain constant. As we said in *Mandley I*:

> "Because Illinois has accepted federal funds to operate an emergency assistance program, it is bound by the eligibility provisions of 42 U.S.C. § 606(e). This need not result in additional expense to the state but with existing appropriations should at least result in helping a broader number of persons, although more moderately than at present." 523 F.2d at 423.

of the complaint and over one year has gone by since the return of our mandate in *Mandley I.* Therefore, we now consider *sua sponte* the objections of the defendants to the merits of plaintiffs' proposed final judgment of November 26, 1975. Cf. *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 410-435.

The state defendants object principally on the grounds that Section "406(e) funding" is no longer utilized by Illinois. For the reasons stated above, we cannot sustain this line of objection.[10] Lest Illinois mistakenly understand this opinion to strip it of control over the implementation of its emergency assistance program, we hereby affirm our observations in *Mandley I:*

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[10] The State defendants also apparently maintain that *Purnell* v. *Edelman,* 511 F.2d 1248 (7th Cir. 1974), is a form of *stare decisis* upon our decision here. In the words of defendants' objection:

> "That case presented a problem to the Trial Court on remand identical to the instant situation. In *Purnell,* the Illinois Department of Public Aid chose to cease its participation in the same 406(e) Emergency Assistance program of utility service 'turnons' and instead adopted a different mode of handling the problem which did not use §406(e) funds. Plaintiffs, on remand to the Court below, sought a Rule to Show Cause why the Defendants should not be held in contempt of Court. Upon being satisfied that the state was no longer claiming funds under the 406(e) Emergency Assistance program, *plaintiffs withdrew their motion for a rule.* In that case withdrawal from the 406(e) program was sufficient to moot the controversy." (Emphasis supplied.)

The answer to this objection is immediate. In *Purnell,* the plaintiffs withdrew their own motion on the propriety of the State's funding of emergency assistance with federal funds not subject to Section 406(e) eligibility standards, thereby voluntarily mooting the case. But in *Mandley II* the plaintiffs, far from voluntarily mooting their own case, are vigorously pursuing an attack on the validity of the state's emergency assistance program.

> "Illinois, should it elect to continue to provide an emergency assistance program in the future, will still have substantial control of its program. It will be able to choose the level of benefits that it will provide and to set the standard of need. It may reasonably limit the amounts paid out in emergency assistance, *Dandridge* v. *Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491, but it will not be able to declare ineligible those who come within the federal definition of eligibility in Section 606(e). This Court need not establish the exact meaning of the eligibility provisions of Section 606(e) because this case requires only that the validity of the specific Illinois program be determined. The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rule-making. Such rule-making should aid the states in preparing programs that are in accord with the eligibility criteria set by Congress." 523 F.2d at 422-423.

Part of the proposed final judgment orders HEW to file a proposed regulation with the district court to conform to our opinion. HEW contends that a federal district court has "no authority to order the performance of a discretionary act, such as the adoption of any particular regulation." But the duty of the Secretary to promulgate regulations implementing the provisions of the Social Security Act is a mandatory one. 42 U.S.C. § 1302. Implicit in HEW's objection is the notion that ordering the promulgation of regulations is an untoward invasion of the province of the Secretary. This contention has been persuasively answered by the Second Circuit. In *Kingsbrook Jewish Medical Center* v. *Richardson,* 486 F.2d 663 (2d Cir. 1973),[11] the court reversed

> "the order below and remand[ed] to the district court with instructions to grant Kingsbrook's motion for summary judgment, to the extent of directing the Secretary of Health, Education and Welfare to promulgate regulations consistent with the interpretation [42 U.S.C.] 1395x(v)(1) that we have announced." 486 F.2d at 670.

In an explanatory footnote, the court observed that:

> "Where there are no material issues of fact in dispute, an appellate court reviewing the dismissal of a complaint can, upon reversal, also remand with directions to grant summary judgment on appellant's previously denied cross-motion. Under the circumstances present here 'we perceive no reason for not bringing this litigation to an end.' Stein v. Oshinsky, 348 F.2d 999, 1002 (2d Cir. 1965); 6 J. Moore, Federal Practice ¶ 56.13 at 2251-52 (2d ed. 1972)."

Since the defendants did not object to the findings of fact in the plaintiffs' final judgment, we can perceive no reason not to bring the instant case "to an end."

Paragraph B-1 of the proposed final judgment purports to order the Secretary to include some specific items in the regulation, *viz.* "definitions of such terms as 'necessary to avoid destitution' and 'lack of available resources' which are comptatible with providing emergency assistance when a needy child is approaching destitution." While it would be salutary to include such definitions in the new regulation and while the Secretary might find it necessary as a matter of administrative practicality to include them, we will not order HEW specifically to include any items in its new regulation.[12] Of course, whatever regulations the Secretary issues must be consistent with today's opinion and *Mandley I*.

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[11] Professor Davis has approvingly characterized this case as an instance of a court being "guided by [its] usual common sense." K. Davis, Administrative Law of the Seventies, § 23.09 at 545 (1976).

We have considered the defendants' other objections to the proposed judgment and find them without merit. Because there has been no compliance with our previous mandate for more than a year, we direct the district court to enter plaintiffs' proposed judgment forthwith except with respect to the definitional aspect of Paragraph B-1. In addition, finding of fact 7 should be deleted as obsolete, and Paragraph A-1(c) must be modified in accord with note 12. A fresh mandate will issue and be returned to the district court this day.

Judgment reversed and remanded for further proceedings consistent herewith.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[12] Because of this change, Paragraph A-1(c) of the final judgment is modified to commence "Until HEW files regulations under Paragraph B-1 below,".

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VENUS MANDLEY, et al.,

Plaintiffs,

v.

JAMES L. TRAINOR, etc., et al.,

Defendants.

No. 73 C 2453

FINAL JUDGMENT AND DECREE

This matter comes on for entry of a final judgment and decree pursuant to prior decisions of this court and pursuant to the mandate of the Court of Appeals reversing in part and affirming in part the orders of this court to and including this court's order of March 14, 1975. The court being fully advised finds and concludes as follows:

FINDINGS OF FACTS

1. Except as modified herein, the factual findings of this court's memorandum decisions of November 21, 1974, February 5, March 14, August 1, and October 24, 1975 are incorporated herein as part of this final judgment.

2. The class of plaintiffs is composed of all (1) Aid to Families with Dependent Children (AFDC) recipients,

(2) applicants for AFDC and (3) other families with needy children, in Illinois who are eligible for emergency assistance within the eligibility standard of §406(e) of the Social Security Act (the Act), 42 U.S.C. §606(e), as set out in paragraph 9 (p. 5) below.

3. Plaintiff Frances Gallman and her family met the eligibility standard of §406(e) at the time of their application in November, 1973, to defendant Illinois Department of Public Aid (IDPA) for emergency assistance.

4. Defendants IDPA and its directors Edelman and Trainor have denied and continue to deny emergency assistance to plaintiff Gallman and to members of the plaintiff class who meet the eligibility standard of §406(e) but whose emergency need arises from circumstances other than those described in defendants' regulations, IDPA Categorical Assistance Manual Ch. 6500, since renumbered as Ch. PO 610.5.

5. The state defendants have reported to this court the length of time taken to process requests for emergency assistance, these reports having been made pursuant to the court's order of March 14, 1975. There the court required defendants to speed up the processing of emergency assistance requests from the "not uncommon" 7-10 days found by the court in its order of November 21, 1973, so that emergency assistance requests will normally be disposed of within 24 hours. These reports show and I find as follows:

a. For requests for emergency assistance granted during the two reporting periods, May 8 - June 9, 1975 and August 1 - 27, 1975, the periods of time taken for processing requests up to the time a check was ready to be placed in the mail or for pick up was more than one day in 88.8% (103 of 116) of cases in Cook County and in 71.6% (68 of 95) of cases in downstate counties:

	Cook	%	Downstate	%
Same day or 1 day	13	11	27	28.4
2 - 3 days	22	18.6	26	27.4
4 - 6 days	40	33.9	21	22.1
7 - 10 days	16	13.6	13	13.7
11 - 15 days	17	14.4	7	7.4
16 - 25 days	7	5.9	1	1.1
26 or more days	1	.8	0	0
not ascertained	2	1.7	0	0
	118	99.9	95	100.1

b. For requests for emergency assistance granted during the two reporting periods (May 8 - June 9 and Aug. 1 - 27, 1975) four methods of delivery of emergency assistance checks were used: mail, pick up by client at fiscal management office, disbursing order at local office and by "C.D." (unexplained), as follows:

	Cook	Downstate
Mail	60	74
Disbursing Order	16	0
Pick-up at Fisc. Mgmt.	42	9
C.D.	0	12
	118	95

c. The amount of time from the date a check was ready for delivery by mail until receipt by the client during the two reporting periods was as follows:

	Cook	Downstate
1 day	31	34
2 days	8	6
3 days	0	1
4-6 days	0	1
7 or more days	1	3
Not ascertained	20	29
	—	—
	60	74

Therefore, of those known, checks were delivered one or two days after mailing in 97.5 percent of cases in Cook and 88.9 percent downstate.

d. The reports demonstrate and the court finds that great and excessive delays continue to exist in the processing of emergency assistance checks, so that only a small percentage of checks are processed within 24 hours and delivered to the client within one or two days thereafter.

6. Since the mandate of the Court of Appeals was returned to this court, the state defendants have reported that they plan imminently to withdraw from the emergency assistance program authorized by section 406(e) of the Act and have further reported that they plan to provide the same limited emergency assistance avaliable under their program which was challenged and found unlawful in this lawsuit. In so doing, defendants intend to claim federal funds for this emergency assistance program under §§ 402 and 403(a)(1) (regular AFDC funds) of the Act.

CONCLUSIONS OF LAW

8. As defined in paragraph 2 above, this is a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

9. The state defendants have violated and continue to violate § 406(e) of the Act in denying emergency assistance to plaintiff Frances Gallman and members of the class who are eligible for emergency assistance as defined in § 406(e), to wit: families with a needy child (i) under the age of 21, (ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home, (iii) where such child is without available resources, (iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and (v) where such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment.

10. Because defendants' emergency assistance program Categorical Assistance Manual Ch. 6500 (PO 610.5), limits eligibility more narrowly than § 406(e) permits, its enforcement and operation are unlawful.

11. Congress, in §§ 406(e) and 403(a)(5) of the Act has determined the terms of eligibility and funding for an emergency assistance program. The state defendants' effort to avoid the eligibility standards of § 406(e) by claiming funding for emergency assistance from funds available for AFDC or for any other federally funded program is contrary to the clear intent of the Act and a violation of § 406(e)(1).

12. Defendant United States Department of Health, Education and Welfare has violated §§ 406(e) and 402(b) of the Act, 42 U.S.C. §§ 606(e) and 602(b), and its own

regulations, 45 C.F.R. § 233.10(a)(1)(ii)(A), in approving and funding Illinois' emergency assistance plan which denies such assistance to members of the plaintiff class made eligible by § 406(e).

13. Defendant H.E.W., furthermore, may not approve or fund a state's emergency assistance program, whether designated as a "special need" or otherwise, except as authorized by § 406(e).

14. The state defendants have violated and continue to violate § 406(e) of the Act and regulations promulgated thereunder, 45 C.F.R. § 233.120(a)(5), which require that emergency assistance be given forthwith, by causing, and failing to correct after this court's order of November 21, 1974, serious delays in providing emergency assistance to members of the plaintiff class.

It Is Therefore Ordered And Decreed, as follows:

A. Defendants the Illinois Department of Public Aid, Joel Edelman and James I. Trainor, their successors in office, agents, employees and assigns are enjoined, so long as Illinois receives federal funding under Title IV-A of the Social Security Act, from claiming reimbursement for emergency assistance (however designated) under any other section of the Act than §§ 406(e) and 403(a)(5) and are enjoined from using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of § 406(e), and are further enjoined from denying emergency assistance to plaintiff Frances Gallman and to any member of the plaintiff class with a needy child

(i) who is under the age of 21,

(ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home,

(iii) where such child is without available resources,

(iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and

(v) such destitution did not arise because such child or relative refused without good cause to accept employment or training for employment.

In furtherance of this injunction these defendants are specifically directed to do the following:

1. Within 7 days from entry of this order, defendants shall file with the court and with defendant HEW amendments to its AFDC Categorical Assistance Manual (and to forms and other necessary instructions to staff) consistent with the terms of this order. These amendments shall

(a) Set forth the availability of emergency assistance to families with a needy child in the terms set out in (i)-(v) above.

(b) Specify that non-AFDC eligible children are eligible for emergency assistance if they meet the eligibility standards of (i)-(v) above.

(c) Until HEW files regulations under ¶ B-1 below, establishes a definition of the terms "lack of available resources" and "necessary to avoid destitution" which are compatible with providing emergency assistance when a needy child is approaching destitution.

(d) Establish amounts of assistance, forms of payment and types of services to be provided.

(e) Set forth examples of common forms of destitution to be avoided by provision of emergency assistance, including, but not limited to imminent eviction, imminent termination of utilities, and lack of food, basic clothing and household furnishings.

(f) Set forth examples of common causes of such destitution, including but not limited to fire and other disaster causing homelessness or damage to personal possessions, eviction, theft, abandonment by a parent, delays in awaiting normal processing of AFDC applications, failure to receive AFDC assistance due to administrative error and failure to receive other forms of income.

2. Defendants' submission pursuant to paragraph A. 1 (p. 8) herein shall not define eligibility more narrowly than § 406(e) of the Act and shall be equitable as required by 45 C.F.R. § 233.10(a)(1)(ii).

3. Defendants shall review within 30 days from entry of this order the IDPA hearing decision, No. 73-4155, of March 18, 1974 denying emergency assistance to plaintiff Frances Gallman in the circumstances alleged in this complaint, and shall enter a new decision in compliance with the Court of Appeals' decision and this order. Such decision shall be promptly filed with this court and defendants shall report all further action including payment made with respect to her administrative appeal.

4. In order to assist the parties and this court with further proceedings for compliance the state defendants shall, within 30 days of the entry of this order, commence to register all requests by needy families with children for emergency aid, categorizing such requests by a) type of need, b) cause of need, c) department response, and d) reasons for denial if denial of the request occurs, and shall submit to this court monthly until further order of court the information obtained from such registry.

5. Plaintiffs shall have 7 days after submission of the materials required in paragraph A.1-4 herein in which to file comments or objections.

B. Defendant U.S. Department of Health, Education and Welfare is hereby enjoined from approving state plans for emergency assistance which limit eligibility more narrowly than § 406(e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406(e) and 403(a)(5). In furtherance of this injunction, H.E.W. is specifically ordered as follows:

1. Within 60 days from entry of this order, it shall file with the court proposed regulations governing emergency assistance, which proposed regulations shall be in accord with the opinion of the Court of Appeals, with this order and with 45 C.F.R. § 233.10(a) (1)(ii)(A).

(a) Plaintiffs shall have 15 days after submission of the proposed regulations in which to comment.

(b) Upon approval by this court and completion of procedures required by law for promulgation of regulations, defendant H.E.W. shall publish the regulations in the Federal Register and Code of Federal Regulations.

2. Within 90 days after submission of Illinois' plan for emergency assistance pursuant to Paragraph A (pp. 7-9) above, H.E.W. shall notify the court and the parties of its action in approving or disapproving the amended plan in accordance with standards set by the Act, this order and the decision of the Court of Appeals.

C. Defendants Illinois Department of Public Aid, Joel Edelman and James L. Trainor, their successors in office, employees, agents and assigns are enjoined from failing to ensure that emergency assistance grants are given forthwith to members of the plaintiff class, and are specifically directed in furtherance of this injunction to modify their procedures to provide as follows:

1. Caseworkers and necessary supervisory and other staff shall give preference to requests for emergency assistance over all other work assignments. Within 24 hours of a request staff shall verify need, determine eligibility and follow all necessary procedures to secure issuance of the emergency assistance payment, whether by disbursing order or check. This time period may not be extended except—

   (a) for the time attributable to delay caused by an applicant's failure to provide essential information within his or her understanding and immediate control, or

   (b) by waiver signed by the applicant for emergency aid.

Delay based upon an applicant's fault in (a) above shall be clearly described in the applicant's case record maintained by the department. In a case of waiver, the original waiver shall be maintained in the case record and the applicant shall be furnished a copy.

2. An individual requesting emergency assistance shall be advised orally and in writing during the initial interview that if eligible he or she may receive a disbursing order at the local office that day or within 24 hours of the request or, if the client prefers, a check may be mailed from Springfield or Chicago to an address provided by the client.

3. An applicant for emergency assistance not yet regularly receiving AFDC, as well as an applicant for emergency assistance currently receiving AFDC, shall have his or her emergency assistance request acted upon within the time limits of paragraph 1 above.

4. Defendant Trainor shall amend the Department's Categorical Assistance Manual to incorporate paragraphs B 1, 2 and 3 above.

(a) A copy of the amendment shall be submitted to the court not later than 15 days from entry of this order. Plaintiffs may within 10 days thereafter file comments in response thereto.

(b) Defendants shall distribute the bulletin or amendment to casework staff within 10 working days after receipt of the court's approval of it.

(c) The amendment issued in compliance with this order shall be filed with the court and shall not be modified or in any way changed without obtaining leave of court beforehand.

5. For each month beginning with the first month following entry of this order and continuing thereafter until further order of the court, defendants shall report their compliance with this order in a form substantially similar to defendants' reports of June (undated) and September 18, 1975, with additional information showing the cause for any delay greater than 24 hours from the time of request until a disbursing order or check is ready for delivery.

D. Defendant Trainor is further ordered to give notice to class members by the following methods:

1. In the next regular mailing for AFDC warrants, defendants shall enclose a notice setting out in easily understandable language the changes in emergency assistance effected by this order.

2. Within 60 days of entry of this order, defendant shall cause to be prominently displayed in all public areas

of each public aid office in Illinois a poster describing in easily understandable language the material terms of this order.

3. The notice described in paragraph 1 and the poster described in paragraph 2 shall describe the type of need and possible circumstances under which emergency assistance is available and the conditions of eligibility for the program.

E. This order and compliance with this order shall not be interpreted as altering or in any manner affecting other obligations defendants have with respect to providing prompt assistance to AFDC applicants and recipients and/or providing emergency assistance to AFDC applicants and recipients pursuant to other judgments rendered prior to the date of this order or pursuant to state law.

F. This judgment shall be binding on defendants, their officers, agents, attorneys, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

G. This court shall retain continuing jurisdiction over this cause for purposes of enforcement.

H. Plaintiffs are awarded their costs in this matter.

....

Thomas R. McMillen,
United States District Judge

Date: ....

Supreme Court, U. S.
FILED
JUL 18 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1159

ARTHUR F. QUERN, DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL.,

Petitioners,

vs.

VENUS MANDLEY, ET AL.

Respondents.

No. 76-1416

JOSEPH A. CALIFANO, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Petitioner,

vs.

VENUS MANDLEY, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI
FILED FEBRUARY 22 AND APRIL 13, 1977.
CERTIORARI GRANTED JUNE 6, 1977

KEENAN PRINTING COMPANY (312) 372-0068 — 365

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IN THE

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**ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

APPENDIX

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9-25-73	Filed Complaint and one copy.
9-28-73	Filed defendant's Answer.
12-20-73	Filed AMENDED COMPLAINT.
1-9-74	Filed defendants' notice: answer to amended complaint.
2-11-74	Filed Amendment to answer to amended complaint.
3-13-74	Filed answer of Secretary of Health, Education and Welfare to amended complaint.
7-17-74	Enter order dated 7-16-74: Enter order that motion of defendants Edelman and Illinois Department of Public Aid to amend their answer to amended complaint, and verbal motion of defendant U. S. Department of Health, Education & Welfare to similarly amend its answer, are granted, and trial date will stand unless plaintiffs file a Second Amended Complaint. (DRAFT) – McMillen, J. Notices mailed 7-17-74.
11-21-74	Enter order dated November 21, 1974: Enter decision that judgment is entered in behalf of the defendants on the amended complaint insofar [as] it challenges the content of former defendant Edelman's emergency assistance program as it existed on October 2, 1973, but State defendant is ordered to show cause within a reasonable time he[illegible] how the administration and

DATE	PROCEEDINGS
	delivery of emergency assistance can be expedited, preferably on the next court date. This case will be called for a progress report on Tuesday, December 3, 1974 at 10:00 a.m. (DRAFT) – McMillen, J. Notices mailed 11-21-74.
10-24-75	Filed Certified Copy of an order dated September 25, 1975 from the USCA, 7th Circuit: Judgment AFFIRMED as to the order of March 14, 1975; and the order of November 21, 1975, is REVERSED insofar as it sustained the validity of the Illinois program for emergency assistance, in accordance with the opinion of this Court filed this date. Costs of this appeal are awarded to plaintiffs.
10-28-75	Enter order dated October 24, 1975: Enter order that since the position of the parties with respect to further litigation in this case must be determined after the mandate has been received from the Court of Appeals, thus [sic] case will be called for a report on status on Friday, October 31, 1975 at 10:00 a.m., at which time the parties will be expected to outline to the court what they propose to do in order to avoid further hearings, or if such hearings are necessary, what issues will be litigated therein. (DRAFT) – McMillen, J. Notices mailed 10-28-75.
11-3-75	Enter order dated October 31, 1975: Plaintiff's motion for leave to submit a proposed final judgment is denied. Cause is continued for a

DATE	PROCEEDINGS
	status report to November 18, 1975 at 11:30 a.m. – McMillen. J. Notices mailed 11-3-75.
11-25-75	Filed plaintiffs' report on defendants' attempt to evade requirements of § 406(e) of the Social Security Act; affidavit by Michael F. Lefkow; notice of filing.
12-1-75	Filed defendants' notice of filing; motion to dismiss; attachments.
12-1-75	Filed plaintiffs' motion for entry of final judgment and decree.
12-2-75	Enter order dated December 1, 1975: Plaintiffs' motion for entry of final judgment and decree is denied. Defendants are granted 1 week to file memorandum in support of their motion to dismiss for want of mootness, responsive memoranda shall be filed 1 week thereafter and the motion to dismiss will be taken under advisement. Cause is taken off the call. – McMillen, J. Notices mailed 12-2-75.
12-4-75	Filed plaintiffs' request for admission of facts. Filed plaintiffs' request for production of documents.
12-9-75	Filed Government's motion.
12-10-75	Filed plaintiffs' motion to reconsider entry of final judgment and decree.
12-12-75	Filed plaintiffs' answer to defendants' motions to dismiss.
12-17-75	Filed plaintiffs' memorandum in opposition to motions to dismiss; exhibits.

DATE	PROCEEDINGS
12-18-75	Filed supplement and amendment to plaintiffs' answer to defendants' motions to dismiss; exhibits.
12-31-75	Filed notice of appeal on behalf of plaintiffs.
1-21-76	Filed defendants' notice of filing with objections to the entry of plaintiffs' proposed order.
1-22-76	Filed federal defendants' objections to plaintiffs' proposed final judgment.
2-3-76	Enter order dated December 31, 1975: Enter decision that motion of defendants to dismiss this case as moot is denied. Further ordered that defendants file their objections to proposed final judgment and decree filed by plaintiffs herein on November 26, 1975 within 3 weeks hereof, serving a copy of their objections on attorneys for plaintiffs. This case will be called for a report on status on MONDAY, MAY 3, 1976 at 10:00 a.m. subject to whatever motions may be filed by any party, if any. (DRAFT). – McMillen, J. Notices mailed 2-3-76.
2-9-76	Filed plaintiffs' motion to dismiss appeal.
2-9-76	Filed plaintiffs' motion for leave to file instanter response to defendants' objections to final judgment and decree.
2-9-76	Filed plaintiffs' motion for entry of final judgment and decree.
2-9-76	Filed plaintiffs' motion for award of attorney's fees.

DATE	PROCEEDINGS
2-10-76	Enter order dated February 9, 1976: Plaintiffs' motion to dismiss appeal is granted. Plaintiffs' motions (1) for leave to file response to objected final judgment, (2) to enter final judgment and decree and (3) to award attorneys' fees are entered and continued to May 3, 1976 at 10:00 a.m. – McMillen, J. Notices mailed 2-10-76.
4-2-76	Filed Certified Copy of Order from U.S.C.A. 7th Circuit dated May 31, 1976: IT IS ORDERED that the aforesaid petition for Writ of Mandamus be, and the same is hereby, DENIED.
4-13-76	Filed defendant James L. Trainor's notice of motion with motion for a protective order with affidavits of Jesse B. Harris and George Grumley.
4-14-76	Filed plaintiffs' response to motion for protective order.
4-15-76	Enter order dated April 14, 1976: Ordered that defendant James L. Trainor is protected from having his deposition taken. Until further order of this court. (DRAFT) – McMillen, J. Notices mailed 4-15-76.
5-3-76	Filed state defendants' Notice of Filing; Report to the Court.
5-4-76	Enter order dated 5-3-76: State defendants granted 10 days to file description of plan. Parties granted 1 week thereafter to file objections. Further status report is continued to Monday, May 24, at 11 a.m. – McMillen, J.

DATE	PROCEEDINGS
5-4-76	Enter order dated 5-3-76: Plaintiffs' motion for leave to file response to objected final judgment, to enter final judgment and for attorneys' fees is entered and continued generally. – McMillen, J. Notices mailed 5-4-76.
5-12-76	Filed state defendants' Notice of Filing; Report to the Court of Description of Defendants' Proposed Plan for Emergency Assistance.
5-19-76	Filed Plaintiffs' Statement in Lieu of Objections to Defendants' Proposed Plan for Emergency Assistance.
5-19-76	Filed Secretary's Comments on Director Trainor's Plan Description filed May 12, 1976.
5-21-76	Filed State Defendants' Notice of Motion; Motion to Change Status Date.
5-24-76	Enter order dated 5-21-76: Defendants granted 10 days to file an Amended Plan. Status report is reset from May 24, 1976 to Tuesday, June 1, 1976 at 10:30 a.m. – McMillen, J. Notices mailed 5-24-76.
6-2-76	Enter order dated 6-1-76: Further status report is continued to Monday, June 21, 1976 at 10 a.m. – McMillen, J. Notices mailed 6-2-76.
6-18-76	Filed defendants' Notice of Filing; Report of Status.
6-21-76	Filed plaintiffs' June 21, 1976 report to the Court.

DATE	PROCEEDINGS
7-6-76	Filed plaintiffs' July 6, 1976 report to the Court.
7-7-76	Enter order dated 7-6-76: Plaintiff granted to July 12, 1976 at 10:30 a.m. to file an amended complaint. – McMillen, J. Notices mailed 7-7-76.
7-9-76	Filed plaintiffs' memorandum in support of motion to vacate order and to compel deposition of defendant Trainor.
7-9-76	Filed plaintiffs' Notice of taking depositions of James L. Trainor et al and Notice to produce documents.
7-9-76	Filed Notice of Filing.
7-9-76	Filed plaintiffs' Motion to vacate.
7-12-76	Enter order dated 7-9-76: Plaintiffs' motion to vacate protective order and to compel deposition of defendant Trainor is denied. – McMillen, J. Notices mailed 7-12-76.
7-13-76	Enter order dated 7-12-76: Defendant's motion to dismiss for mootness is granted, and this cause is dismissed for lack of case or controversy. – McMillen, J. Notices mailed 7-13-76.
7-21-76	Filed plaintiffs' Motion to vacate dismissal.
7-27-76	Filed plaintiffs' Motion to advance time for defendants' response to Rule 59 motions and to set decision date for July 30, 1976.
7-28-76	Enter order dated 7-27-76: Plaintiffs' motion to advance time to defendants' response and ruling date is denied. – McMillen, J. Notices mailed 7-28-76.

DATE	PROCEEDINGS
8-11-76	Filed plaintiffs' Notice of Appeal from the order granting defendants' motion to dismiss as moot entered July 12, 1976.
8-31-76	Filed plaintiff/appellant's Notice of Emergency Appeal.
8-31-76	Certified and transmitted Emergency Record on Appeal consisting of District Court's order of July 12, 1976, dismissing the case and certified copy of the docket entries, along with the letter request for expedited appeal.
9-3-76	Filed USCA No. 76-1865.
11-12-76	Enter order dated November 11, 1976: Enter decision that motion of plaintiff to vacate dismissal and to allow discovery of defendant Trainor is denied (DRAFT). – McMillen, J. Notices mailed 11-12-76.
11-19-76	Filed plaintiffs' Notice of Appeal from the Order and decision of November 11, 1976, and from the district court's order of dismissal dated July 12, 1976.
11-23-76	Filed certified copy USCA: It is ordered and adjudged that the judgment of the district court in this cause appealed from be and the same is hereby reversed and remanded in accordance with the opinion filed this date.
11-30-76	Enter order dated November 29, 1976: Enter final judgment and decree (draft) (taken off the call for December 1, 1976). – McMillen, J. Notices mailed 11-30-76.
12-6-76	Filed state defendants' Notice of Filing; Defendant James L. Trainor's Response to "Final

DATE	PROCEEDINGS
	Judgment and Decree" entered November 29, 1976.
12-10-76	Enter order dated December 10, 1976: Plaintiffs' motion for rule to show is entered and continued to Monday, December 13, 1976 at 11:30 a.m. – McMillen, J. Notices mailed 12-10-76.
12-10-76	Filed state defendants' Notice of Motion; Motion to Alter or Amend Order of November 29, 1976.
12-10-76	Filed plaintiffs' Motion for Rule to Show Cause; Notice of Filing.
12-15-76	Enter order dated December 13, 1976: State defendants granted 10 days to file sworn response to motion for rule to show cause. – McMillen, J. Notices mailed 12-15-76.
12-21-76	Filed state defendants' Notice of Filing; Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Rule to Show Cause and, in Support of Defendants' Motion to Alter or Amend the Final Judgment and Decree and Second Report to the Court.
12-27-76	Filed Motion to Strike from the Record State Defendants' Motion to Alter or Amend the Judgment and their reports of December 6 and December 21, 1976.
12-27-76	Filed Motion for Supplemental Rule to Show Cause Why the State Defendants Should Not Be Held in Contempt of Court.
12-27-76	Enter order dated December 27, 1976: Plaintiffs' motions for supplemental rule to show

DATE	PROCEEDINGS
	cause, to strike, for leave to file memorandum and defendants' motion under 59(e) are entered and continued to Monday, January 3, 1977 at 10:30 a.m. – McMillen, J. Notices mailed 12-27-76.
12-28-76	Filed Statement to the Court in Lieu of Submission of Draft Injunction Against State Defendants.
1-4-76	[sic] Enter order dated January 3, 1977: Defendants granted 14 days to file a response to rule to show cause and supporting memo to motion under 59(e); taken under advisement. – McMillen, J. Notices mailed 1-4-77.
1-19-77	Enter order dated January 17, 1977: State defendants are given to and including January 25, 1977, to file their briefs in support of their motion to alter this Court's Judgment Order and in opposition to plaintiffs' motion for Rules to Show Cause. Plaintiffs granted to February 4, 1977 to reply. – McMillen, J. Notices mailed 1-19-77.
1-25-77	Filed opinion: It is ordered that this appeal from the decision of the USDC be and the same is hereby dismissed pursuant to Rule 42(b) FRAP.
2-1-77	Filed letter of transmittal; certified copy of order signed January 28, 1977 staying and recalling the mandate of the USCA, 7th Circuit.
2-22-77	Filed Defendant Califano's submission to Court of Proposed Regulations.

DATE	PROCEEDINGS
2-24-77	Filed copy of letter addressed to Hon. Daniel M. Friedman, USSC re application of extension of stay of mandate of USCA denial, dated February 18, 1977.
3-14-77	Filed Plaintiffs' Response to Defendant Califano's Amended Submission to Court of Proposed Regulations.
3-14-77	Filed defendant Califano, Jr.'s Amended Submission to Court of Proposed Regulations.
3-15-77	Enter order dated March 14, 1977: Leave granted to file Califano's amended submission to court of proposed regulations. – McMillen, J.
3-28-77	Filed plaintiffs' Motion for Award of Attorneys' Fees.
3-30-77	Enter order dated March 28, 1977: Plaintiff granted 15 days to file affidavit and memo re motion for attorneys' fees. Defendant granted 10 days thereafter to reply. – McMillen, J. Notices mailed 3-30-77.
4-25-77	Filed defendant's Notice of Motion; Motion for an Extension of Time.
4-26-77	Enter Order dated April 25, 1977: Federal and state defendants are granted 2 weeks to file answering memo re motion for fees. Plaintiffs granted 5 days thereafter to reply. – McMillen, J. Notices mailed 4-27-77.
6-8-77	Enter order dated 6-7-77: In view of the fact that the United States Supreme Court has granted defendants' petitions for writ of certiorari on June 6, 1977, we will hold all motions currently pending before us in abeyance pending the Supreme Court's decision. – McMillen, J. Notices mailed 6-8-77.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN KILGORE, VENUS MANDLEY, GARY McELROY, FRANCES GALLMAN, individually and on behalf of their minor children and on behalf of all others similarly situated; the CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and the ILLINOIS WELFARE RIGHTS ORGANIZATION, an unincorporated association,

Plaintiffs,

vs.

JOEL EDELMAN, Director, Illinois Department of Public Aid; the ILLINOIS DEPARTMENT OF PUBLIC AID; and the UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Defendants.

No. 73 C 2453

AMENDED COMPLAINT

COUNT I

1. This is an action for declaratory and injunctive relief, authorized by the Civil Rights Act, 42 U.S.C. § 1983, to secure rights established by the Social Security Act (the Act), section 406(e), 42 U.S.C. § 606(e) in which Congress established a program to provide emergency assistance to needy families with children, and to secure rights pertaining to emergency assistance which are set out in sections 402 and 403(a)(5) of the Act, 42 U.S.C. §§ 602, 603(a)(5), and in regulations promulgated by the United States Department of Health, Education and Welfare, 45 C.F.R. §§ 201.2, 201.3, 205.5, 233.10(a)(1)(ii), and 233.120. Plaintiffs individually and on behalf of all others similarly situated seek to enjoin the defendants from administering its emergency assistance program in violation of federal and state law.

2. Jurisdiction is conferred on this court by 28 U.S.C. §§ 1331, 1343(3) and (4), and 1346. Declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure. The amount in controversy exceeds $10,000.

3. Plaintiff Ann Kilgore is a citizen of the United States and a resident of Chicago, Illinois. She is suing individually and on behalf of her minor child, William, and on behalf of all others similarly situated.

4. Plaintiff Venus Mandley is a citizen of the United States and a resident of Chicago, Illinois. She is suing individually and on behalf of her two minor children, Keith and Meredith, and on behalf of all others similarly situated.

5. Plaintiff Gary McElroy is a citizen of the United States and a resident of Chicago, Illinois. She is suing individually and on behalf of her five minor children, Marquita, Mongo, Ivy, Carolyn and Larry, and on behalf of all others similarly situated.

6. The named plaintiffs are all recipients of Aid to Families with Dependent Children (AFDC), a federally funded program established by Title IV of the Social Security Act providing for protection of needy families.

7. Plaintiff Chicago Welfare Rights Organization is an Illinois not-for-profit corporation organized to assist its member community welfare organizations in the alleviation of poverty and enforcement of the legal rights of their members, who are welfare recipients and other poor persons. Members of the local community welfare organizations are entitled to receive emergency assistance under the conditions established by the Social Security Act and regulations issued thereunder.

8. Plaintiff Illinois Welfare Rights Organization is an unincorporated association of local welfare organizations in Illinois having a community of interest in assisting in the alleviation of poverty and enforcement of the legal rights of welfare recipients. Members of the local welfare organizations are entitled to receive emergency assistance under the conditions established by the Social Security Act and regulations issued thereunder.

9. The individual (non-organizational) plaintiffs bring this action individually and on behalf of all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is composed of all AFDC recipients, applicants for AFDC, and other families with needy children in Illinois.

10. The class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class, and these questions predominate over any questions affecting only individual members. Plaintiffs' claims are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

11. Defendant Joel Edelman is Director of the Illinois Department of Public Aid and is charged with statewide administration of the federally funded public assistance programs, and with conforming the program to federal and state statutes and regulations pertaining to such programs.

12. Defendant Illinois Department of Public Aid (IDPA) is the agency of the State of Illinois that administers the public assistance programs in Illinois.

13. Defendant United States Department of Health, Education and Welfare is the agency of the United States government that administers and funds public assistance programs of participating states, including Illinois.

14. AFDC is a program of assistance providing funds for basic maintenance for needy families with dependent children in which Illinois participates.

15. Emergency assistance is a separate program of assistance for AFDC recipient families and other families with needy children, providing funds to meet non-recurring emergencies, as opposed to regular maintenance needs, to both recipients and non-recipient families.

16. The emergency assistance program is defined by section 406(e) of the Social Security Act, 42 U.S.C. § 606(e), as follows:

> (e)(1) The term "emergency assistance to needy families with children" means any of the following, *furnished for a period not in excess of 30 days* in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home but only where such child is without available resources the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment —
>
> (A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and
>
> (B) such services as may be specified by the Secretary; but only with respect to a State whose State plan *approved* under section 602 of this title includes provision for such assistance.

17. Participation in the federally funded emergency assistance program is optional with the states, but participating States must comply with federal requirements. Illinois participates in and receives federal funding under the emergency assistance program established by the Social Security Act, 42 U.S.C. § 606(e).

18. The emergency assistance program at issue purports to be the only assistance the IDPA provides plaintiffs and the class they represent in times of emergency. A copy of the emergency assistance program is attached as Exhibit A to this amended complaint.

19. Under the existing plan, emergency assistance is provided only for the following emergencies:

a) When an AFDC family is homeless as a result of damage to the building, rendering it uninhabitable; or when a court-ordered eviction occurs for reasons other than the AFDC recipient's failure to pay rent: or when the AFDC family is potentially homeless due to damage to a portion of the building.

b) When the AFDC applicant, determined presumptively eligible for AFDC, is in emergency need of clothing and/or household furnishings and equipment. (Emergency food and rent can also be authorized by disbursing order at the time the applicant is determined presumptively eligible as provided in this subparagraph.)

20. Under the plan, no assistance is provided to AFDC recipients, applicants for AFDC, and other needy families with children who face destitution, but do not qualify under the categories enumerated in paragraph 19 herein.

21. Plaintiff Ann Kilgore and her son William receive $196 per month under the AFDC program. Her husband, Ralph Kilgore, receives approximately $40 per month under disability assistance for a family total of $236.

22. Plaintiff Venus Mandley and her two children receive $236 per month under the AFDC program, plus an additional $61 excess rent as long as she remains at her present address.

23. Plaintiff Gary McElroy and her five children receive $389 per month under the AFDC program.

24. On October 16, 1973, a fire in Mrs. McElroy's apartment destroyed virtually all of the clothing of herself and her three-year-old daughter, Marquita. The fire also destroyed two of the family's beds. In addition, the fire destroyed two dressers, bed linens, towels, and other household furnishings, as well as food stamps for the month of October.

25. Plaintiff McElroy applied for emergency assistance on October 17, 1973 to restore the clothing, household furnishings and equipment destroyed by the fire and to obtain emergency food.

26. Plaintiff McElroy's application for emergency assistance was denied by agents of defendants Edelman and IDPA because her emergency did not fall within the categories enumerated in paragraph 19 of this amended complaint, namely, because there was no structural damage to the building causing potential homelessness.

27. Plaintiff McElroy has no funds with which to replace the items destroyed by the fire which are necessary for a minimal livelihood.

28. As a result of the allegations stated in paragraphs 23-27 herein, plaintiff McElroy and her family are suffering destitution and injury to their health and well being.

29. Plaintiff Frances Gallman and her four children and one grandchild receive $389 per month under the AFDC program.

30. On November 24, 1973, Mrs. Gallman was attacked and robbed of $550 while on her way to place a cash security deposit and rent payment, as demanded by the landlord, on an apartment to which she planned to move.

31. Thereafter, Mrs. Gallman applied for emergency assistance to enable her and her family to avoid destitution.

32. Agents of defendants Edelman and IDPA denied plaintiff Gallman's application for emergency assistance because her emergency did not fall within the categories enumerated in paragraph 19 of this amended complaint.

33. Plaintiff Gallman has insufficient funds to meet her needs and the needs of her family.

34. As a result of the allegations stated in paragraphs 29-33 herein, plaintiff Gallman and her family are suffering destitution and injury to their health and well being.

35. Members of plaintiff Chicago Welfare Rights Organization include AFDC recipients and other families with needy children who are and will be in need of emergency assistance under the emergency assistance program of the IDPA.

36. Members of plaintiff Illinois Welfare Rights Organization include AFDC recipients and other families with needy children who are and will be in need of emergency assistance under the emergency assistance program of the IDPA.

37. Emergency assistance for emergencies not enumerated in paragraph 19 herein which have arisen and will arise for all the plaintiffs and members of the class, and members of the organizational plaintiffs, will be necessary to avoid destitution and to protect the health and well being of these needy families.

38. Defendants Edelman and IDPA's emergency assistance program fails to meet the requirements of 42 U.S.C. § 606(e) and regulations promulgated thereunder, 45 C.F.R. § 233.120 in the following respects: it fails to provide assistance to avoid destitution resulting from lack, loss or destruction of food, clothing, shelter, utilities, personal essentials and household supplies, and it fails to provide that emergency assistance will be given forthwith.

39. The emergency assistance plan excludes persons from emergency assistance on an arbitrary, unreasonable and inequitable basis in violation of 45 C.F.R. § 233.10(a)(1)(ii).

40. The emergency assistance program violates the Illinois Public Aid Code, Ill. Rev. Stat. ch. 23, § 12-8, which establishes the Public Assistance Revolving Fund and re[illegible]res that it shall be used, inter alia:

> a. To provide immediate financial aid to applicants in acute need who have been determined eligible for aid under Articles III [Aid to the Aged, Blind or Disabled], IV [AFDC] or V [Medical Assistance Program].
>
> b. To provide emergency aid to recipients under said Articles who have failed to receive their grants because of mail box or other thefts, or who are victims of a burnout, eviction, or other circumstances causing privation, in which cases the delays incident to the issuance of grants from appropriations would cause hardship and suffering.

41. Approval of the emergency assistance program of defendants Edelman and IDPA by the United States Department of Health, Education and Welfare, evidencing compliance with section 406(e) of the Act, 42 U.S.C. § 606(e) and regulations promulgated thereunder, including 45 C.F.R. §§ 233.10(a)(1)(ii) and 233.120 has not occurred. 42 U.S.C. §§ 602, 603(a)(5), 45 C.F.R. §§ 201.2-201.3, 205.5.

42. Defendant United States Department of Health, Education and Welfare continues to fund an emergency assistance program which violates federal and state law as

alleged herein, in violation of sections 403(a)(5) and 406(e) of the Act, 42 U.S.C. §§ 603(a)(5) and 606(e), and 45 C.F.R. § 233.120(b).

43. Unless the policies and procedures complained of herein are enjoined by this court, plaintiffs and the members of the plaintiff class will suffer irreparable injury.

44. Plaintiffs have no adequate administrative remedy or remedy at law.

WHEREFORE, plaintiffs pray, individually and on behalf of all others similarly situated, that this Court

1. Enter preliminary and permanent injunctions to restrain defendants from administering an emergency assistance program which violates federal and state law.

2. Enter a declaratory judgment that defendants' emergency assistance program violates the Social Security Act, §§ 402, 403(a)(5) and 406(e), 42 U.S.C. §§ 602, 603(a)(5) and 606(e), and regulations promulgated thereunder, 45 C.F.R. §§ 201.2, 201.3, 205.5, 233.120, 233.10(a)(1)(ii) and the Illinois Public Aid Code, Ill. Rev. Stat. ch. 23, § 12-8.

3. Allow plaintiffs their costs herein and grant such further relief as may be just and appropriate.

COUNT II

1. This is an action for declaratory and injunctive relief, authorized by the Civil Rights Act, 42 U.S.C. § 1983, to secure rights established by the equal protection clause of the Fourteenth Amendment, the supremacy clause of Article 6, section 2 of the Constitution, the Social Security Act, 42 U.S.C. §§ 601 et seq., and the Illinois Public Aid Code. Plaintiffs, individually and on behalf of all others similarly situated, seek declaratory and injunctive relief against defendants' actions in administering an inadequate emergency assistance program.

2 - 44. Plaintiffs reallege and incorporate paragraphs 2-44 of Count I as and for paragraphs 2-44 of Count II.

45. The implementation of the emergency assistance program by defendants creates two classes of AFDC recipients, applicants for AFDC, and other families with needy children: one composed of persons with emergency need who will be able to obtain emergency assistance upon a showing of emergency need within the categories enumerated in the emergency assistance plan; the other composed of persons similarly situated whose emergency needs are not within said categories and who will not be able to obtain emergency assistance. Plaintiffs and members of the plaintiff class unable to obtain emergency assistance are being and will be subjected to arbitrary and invidious discrimination without a rational relation to a legitimate state interest, in violation of the equal protection clause of the Fourteenth Amendment.

46. Unless the policies and procedures complained of herein are enjoined by this court, plaintiffs and members of the plaintiff class will suffer irreparable injury.

47. Plaintiffs have no adequate administrative remedy or remedy at law.

WHEREFORE, plaintiffs pray, individually and on behalf of all others similarly situated, that this court

1. Enter preliminary and permanent injunctions against implementation of the emergency assistance program in violation of plaintiffs' rights under the equal protection clause of the Fourteenth Amendment.

2. Enter a declaratory judgment that defendants' emergency assistance program violates plaintiffs' rights under the equal protection clause of the Fourteenth Amendment.

3. Allow plaintiffs their costs herein and grant such further relief as may be just and appropriate.

Joan Humphrey

Stephen G. Seliger

Lorelei Borland

Michael F. Lefkow

James D. Weill

Legal Assistance Foundation of Chicago
4564 N. Broadway
Chicago, Illinois 60640
769-1015

EXHIBIT

EMERGENCY ASSISTANCE PROGRAM

6500 *Provisions*

The Emergency Assistance Program is a means of meeting emergent needs of AFDC applicants determined eligible for a money payment and AFDC recipients who receive regular monthly grants. (Migrant workers with families are not eligible for this Emergency Assistance Program.) Emergency Assistance is available for a period not to exceed 30 consecutive days in any 12 consecutive months.

An "emergent need" exists when one of the following crisis situations occurs:

1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
2. A court-ordered eviction occurs for reasons other than the recipient's failure to pay rent.
3. The AFDC family is potentially homeless due to damage to a portion of the building.
4. The AFDC applicant, determined presumptively eligible for AFDC, is in emergent need of clothing and/or household furnishings and equipment. (Emergent food and rent can also be authorized by disbursing order at the time the applicant is determined presumptively eligible as provided in this paragraph. Any amount thus authorized may not exceed the amount calculated as the applicant's first month's payment, and will be deducted from the applicant's first month's payment.)

Verification by staff of the emergent need is required prior to authorization of Emergency Assistance.

6510 *Financial Assistance Provided*

Upon verification of emergent need, Form DPA 1164, Request for Emergency Assistance, will be completed in triplicate and two copies forwarded to:

Bureau of Fiscal Management
Illinois Department of Public Aid
618 East Washington Street
Springfield, Illinois 62726

Upon proper completion of Form DPA 1164, an emergency check will be issued by the Bureau of Fiscal Management. One copy of Form DPA 1164 will be returned to the county department/district office indicating the date and amount for which the emergency check is authorized.

If a mailing address for the emergency check is questionable, the check should be addressed to the grantee in the care of the county department/district office.

Assistance granted under this provision will not be deducted from future assistance payments.

6511 *Homelessness*

Emergency Assistance may be authorized to meet emergent needs for food, clothing, household furnishings, household equipment, rent and moving expenses in amounts not to exceed those listed below. The amounts are maximum allowances and the payment authorized should be based upon verification of the family's need for each individual item.

1. **Food**

If money is needed for the purchase of food, each person in the assistance unit may be allowed $1 per day, prorated to the next regular check date.

Special Food Stamp Authorization Procedures. AFDC families participating in the Food Stamp Program who have suffered loss or destruction of food stamps may have their previously issued food stamps replaced (see Food Stamp Manual topic 5300). Recipients who have suffered the loss of Food Stamp Authorization Cards are to be provided with a replacement card. Eligible families not regularly participating in the Food Stamp Program may be eligible for food stamps (see Food Stamp Manual Chapter 9000).

2. Clothing, Household Furnishings, Household Equipment

Size Assistance Unit	Clothing	Household Furnishings	Household Equipment
2	$ 48	$ 84	$ 11
3	72	121	14
4	96	121	14
5	120	166	16
6	144	166	16
7	168	212	18
8	192	212	18
Each Additional Person	24	23	1

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3. **Shelter Costs (Based on groupings of counties in Chapter 1000)**

Group I Counties	$117
Group II Counties	102
Group III Counties	72

4. **Moving Costs**

Cook County The IDPA Relocation Service will be responsible for providing moving service and shall assume responsibility for payment to all vendors providing such service.

Relocation Service Section
Illinois Department of Public Aid
209 West Jackson Boulevard
Chicago, Illinois 60606

If a request for other emergent needs is being made, a separate DPA 1164 will be completed according to procedures described in topic 6510.

Downstate A maximum of $100 can be authorized for moving costs.

6512 *Court-Ordered Eviction*

Moving costs only may be authorized for emergent needs resulting from a court-ordered eviction which occurs for reasons other than the recipient's failure to pay rent. The policy provided in topic 6511 pertaining to moving costs is applicable.

6513 *Potential Homelessness*

Emergency Assistance may be authorized to meet emergent needs for food, clothing, household furnishings and household equipment. The policy provided in topic 6511 pertaining to the maximum allowances for these items is applicable.

6514 *Emergent Need at Point of Initial Eligibility*

Emergency Assistance may be authorized to meet emergent needs for clothing, household furnishings and household equipment for applicants determined eligible for AFDC and who, at the point of application, have an emergent need for these items. The policy provided in topic 6511 pertaining to the maximum allowances is applicable.

6520 *Medical Care Expenses*

Medical assistance to AFDC families will be provided in accordance with the approved Illinois Title XIX Medical Assistance Plan (see Manual Chapter 5000 for procedures regarding the replacement of the Medical ID Card). Funeral and burial expenses will be met under the provision of existing policy (see Manual Chapter 6150).

6530 *Social Services*

All social services provided by the Department will be available to AFDC families requiring Emergency Assistance by initiating an immediate referral to the Social Services Unit. Services available to the recipient will include, but are not limited to, information, referral counseling, and services to assist the recipient in securing family shelter.

United States Court of Appeals for the
Seventh Circuit

Nos. 75-1083, 75-1245

VENUS MANDLEY ET AL., PLAINTIFFS-APPELLANTS

v.

JAMES L. TRAINOR ET AL., DEFENDANTS-APPELLEES

Argued June 6, 1975 — Decided Sept. 25, 1975

Before MOORE,* Senior Circuit Judge, CUMMINGS
and BAUER, Circuit Judges.

CUMMINGS, Circuit Judge.

This class action was brought by Illinois recipients of the Aid to Families with Dependent Children (AFDC) program and the Illinois and Chicago Welfare Rights Organizations against the Illinois Department of Public Aid (the Department), its director and the United States Department of Health, Education and Welfare (HEW). Plaintiffs alleged that the Department's revised program for emergency assistance to AFDC recipients violated Section 406(e) of the Social Security Act (42 U.S.C. § 606(e)), regulations promulgated thereunder by HEW, the Equal Protection Clause of the Fourteenth Amendment, and the Illinois Public Aid Code (Ill. Rev. Stats. ch. 23, § 12-8 (1973)). Plaintiffs sought declaratory and injunctive relief against the implementation and operation of the program and an injunction requiring expedited processing and delivery of emergency assistance to those eligible to receive it.

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*Senior Circuit Judge Leonard Page Moore of the Second Circuit is sitting by designation.

After a bench trial, the district court rendered a decision holding that the Illinois program for emergency assistance conforms to the requirements of federal and state law, except that the processing was too slow. Jurisdiction was refused with respect to the pendent state claim that the Illinois program violates the Illinois Public Aid Code. However, the State defendants were ordered to show cause with respect to expediting emergency assistance.

In its second memorandum opinion, the district court ordered the State defendants to show cause why emergency assistance checks could not be written in Chicago or in a district office other than Springfield, Illinois, or why some other method of payment could not be devised to eliminate delays from unnecessary Springfield mailings.

The district court's final decision was entered on March 14, 1975. This order specified the steps to be taken by the Department to speed up the delivery of assistance in Cook County. However, in practical effect the order did not require the State defendants to furnish emergency assistance in the 101 other Illinois counties by any means other than mailing from Springfield.

Plaintiffs appealed from the original and final orders of the district court insofar as they denied plaintiffs the requested relief. We find the Illinois emergency assistance scheme to be in conflict with the Social Security Act and therefore invalid by virtue of the Supremacy Clause of the Constitution. Accordingly, we reverse that portion of the district court's order that is to the contrary.[1]

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[1] Such reversal was also sought by various charities that filed a brief *amici curiae*.

In 1935, Congress enacted the AFDC program as Title IV–A of the Social Security Act. Provision for the economic security of children was made by offering substantial federal funds to states submitting plans complying with the Act and HEW regulations. In 1968, Congress enacted an emergency assistance program to enable states to meet the immediate needs of children. The present dispute concerns the mandatory scope of the program under the federal statute once a state decides to include emergency assistance in its plan.

The key provision of the Social Security Act with respect to emergency assistance to needy children is contained in 42 U.S.C. § 606(e) (Section 406(e) of the Act) which provides:

> (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment —
>
> (A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

> (B) such services as may be specified by the Secretary;
>
> but only with respect to a State whose State plan approved under section 602 of this title [section 402 of the Act] includes provision for such assistance.
>
> (2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

In summary, this statute authorizes emergency assistance to a needy child under 21, living with relatives specified in 42 U.S.C. § 606(a), who is without available resources, if the assistance is necessary to avoid destitution or to provide living arrangements in a home, and if the need did not arise because such child or relatives refused without good cause to accept training or employment.

Under the March 1971 Illinois emergency assistance plan, its first election of the reimbursement of provisions in 42 U.S.C. § 606(e), eligibility was limited to AFDC recipients and confined to the following needs:

> § 6510 EMERGENCY ASSISTANCE PROVISIONS: ACTIVE AFDC ONLY
>
> (*a*) Paying delinquent rent or property payments allowed in lieu of rent to prevent eviction;
>
> (*b*) Paying delinquent utilities bills to restore discontinued service; and
>
> (*c*) Meeting immediate, emergent needs for other items of basic need included in the Standards of Assistance.

Moving costs were later added, and needy families not eligible for AFDC were excluded unless their needs resulted from civil disorders.

Subsequently HEW suggested that Illinois should be more specific in the listing of the emergencies it did compensate. Therefore, on October 1, 1973, the Department revised its program and limited assistance to situations where an "emergent need" existed. The payments were still restricted to those eligible for AFDC and further restricted by the definition of "emergent need":

> An "emergent need" exists when one of the following crisis situations occurs:
>
> 1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
>
> 2. A court-ordered eviction occurs for reasons other than the recipient's failure to pay rent.
>
> 3. The AFDC family is potentially homeless due to damage to a portion of the building.
>
> 4. The AFDC applicant, determined presumptively eligible for AFDC, is in emergent need of clothing and/or household furnishings and equipment.
>
> (Ch. 6500 of the Categorical Assistance Manual of the Department.)

Since the eligibility provisions were severely restricted in the October 1973 revisions in the program, the Department has provided only about one-fifth of the total dollar aid provided to needly families under the prior program.

Plaintiffs challenge the Illinois program for administering reimbursable emergency assistance under 45 U.S.C § 606(e), Section 406(e) of the Social Security Act, as invalid for both constitutional and non-constitutional reasons. In accord with the time-honored practice of avoiding constitutional questions where a non-constitutional ground exists for resolving the case, this Court deals first with plaintiffs' statutory argument.[2]

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[2] Plaintiffs plead federal question jurisdiction, which requires that more than $10,000 exclusive of interest and costs be in controversy. 28 U.S.C. § 1331. The complaint asserts that such an amount is in controversy and defendants do not complain that jurisdiction has been improperly exercised by the district court. This Court must assure itself that the district court had jurisdiction, regardless of the positions taken by the parties, because federal courts are courts of limited jurisdiction.

Assuming without deciding that the plaintiffs cannot properly show $10,000 as to each member of the class because of the 30-day per year restriction on emergency (*Baxter* v. *Minter,* 378 F. Supp. 1213, 1216-1217 (D. Mass. 1974), there is no § 1331 jurisdiction. See generally Note, Federal Judicial Review of State Welfare Practices, 67 Colum.L.Rev. 84 (1967). Since plaintiffs here allege Civil Rights Act jurisdiction through 42 U.S.C. § 1983 and 28 U.S.C. § 1343, and since the claim is not insubstantial, the statutory claims against the state defendants, at least, may be taken pendently. See *Philbrook* v. *Glodgett,* 421 U.S. 707, 95 S. Ct. 1893, 44 L. Ed. 2d 525. Jurisdiction over the federal defendant is unavailable under the Civil Rights Act, so that the assertion of pendent jurisdiction over it is a complex and difficult jurisdictional question. See *Philbrook, supra,* at 720-722, 95 S. Ct. 1893.

However, since the plaintiffs also allege jurisdiction under 28 U.S.C. § 1361, and since this Court concludes *infra* that Section 606(e) does set forth mandatory eligibility standards in the absence of clear intent to the contrary in the federal statute or its history, mandamus jurisdiction will lie with respect to the federal defendant. Thus this Court need not reach the difficult pendent jurisdictional question. In holding Section 1361 applicable here, we are

VALIDITY OF ILLINOIS EMERGENCY ASSISTANCE PLAN

Plaintiffs first argue that defendants' program unlawfully excludes persons made eligible by the emergency assistance provisions of the Social Security Act. Plaintiffs claim that the Illinois program has unlawfully established eligibility standards narrower than those in 42 U.S.C. § 606(e) because that program provides assistance only to persons whose emergency needs fall within four limited types of crisis situations and provides no emergency assistance for families who are not applicants for or recipients of AFDC. Thus needy families who are in danger of destitution within the meaning of 42 U.S.C. § 606(e), but who are not otherwise eligible for AFDC or whose destitution came about in a manner not enumerated in Chapter 6500 of the Department's Manual, are denied emergency assistance. Plaintiffs rely especially on *Carleson* v. ***Remillard***, 406 U.S. 598, 92 S. Ct. 1932, 32 L. Ed. 2d 352; *Townsend* v. *Swank*, 404 U.S. 282, 92 S. Ct. 502, 30 L. Ed. 2d 448; *Lewis* v. *Martin*, 397 U.S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561; and *King* v. *Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118.[3] Those cases establish that a state program which restricts eligibility beyond what was intended by Congress is invalid for inconsistency with the Social Security Act. In *Townsend*, the Illinois defendants and HEW asserted that Congress authorized the states to vary eligibility requirements from federal standards. However, the Court held that once a state elected to extend benefits to 18-20 year-olds, it was required to include all those made eligible by 42 U.S.C. § 606(a)(2)(B), including college students. The other cases cited *supra* are similar. Each case involves a state's attempt to draw AFDC eligibility criteria more narrowly than the eligibility criteria set out in the Social Security Act and each attempt was rejected as invalid as contrary to the intent of Congress.

Section 406(e) of the Act extends coverage for emergency service to a family with a needy child under 21 living with any of the relatives specified in Section 406(a)(1), in a place of residence maintained by one or more of such relatives as his or their own home. However, Congress limited the reimbursement for emergency assistance for such a needy family to situations where the child is without available resources and assistance and the assistance is necessary to avoid destitution or to provide a living place in a home for such child, provided "such destitution or need for living arrangements did not arise

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mindful of the criteria set out in *City of Highland Park* v. ***Train***, 519 F. 2d 681 at 691 (7th Cir. 1975, and modified July 24, 1975), for exercising mandamus jurisdiction. These criteria are satisfied in this case.

Since HEW would be practically bound by our decision, even if it were technically handed down only with respect to the state defendants, we assume that HEW would move to intervene on remand even if we had dismissed it in this Court. See ***Philbrook***, *supra*, at 720-722, 95 S. Ct. 1893.

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[3] See also *Van Lare* v. *Hurley*, 421 U.S. 338, 95 S. Ct. 1741, 44 L. Ed. 2d 208; *Philbrook* v. *Glodgett*, 421 U.S. 707, 95 S. Ct. 1893, 44 L. Ed. 2d 525; *Burns* v. *Alcala*, 420 U.S. 575, 95 S. Ct. 1180, 43 L. Ed. 2d 469; and *Lascaris* v. *Shirley*, 420 U.S. 730, 95 S. Ct. 1190, 43 L. Ed. 2d 583.

because such child or relative refused without good cause to accept employment or training for employment." In our view, all children who fall within this definition are made eligible for emergency assistance.

Section 406(e) specifically permits two areas of state discretion. Thus the state is permitted to furnish emergency assistance in the form of "money payments, payments in kind, or such other payments as the State agency may specify." Also, Congress provided that a state may provide emergency aid to migrant farm workers (presumably despite residency requirements in the state plans), and may select parts of the state in which to provide emergency assistance to migrant workers (presumably despite the mandate in 42 U.S.C. § 602(a)(1) that elected programs must be administered statewide).

The state defendants and, to a lesser degree, the federal defendant insist that the language of 42 U.S.C. § 606(e)(1) does not establish standards of eligibility at all, but merely defines the maximum limits of reimbursable emergency assistance. Thus in their view Section 606(e)(1) describes what is provided, rather than who is covered. We reject this semantical argument. Similar arguments could have been made in *King, Townsend* and *Carleson* as to the eligibility provisions of the Social Security Act discussed there; yet the Supreme Court viewed the provisions as relating to eligibility. The provisions in Section 606(e)(1) discussed *supra* describe eligibility criteria for the emergency aid program. Thus the central issue in this case becomes whether Congress intended to allow the states to apply eligibility criteria that are narrower than those set out in Section 606(e)(1). If, as plaintiffs argue, Congress intended that any state which elected to participate in the emergency aid reimbursement program must provide aid to all those eligible under the provisions of Section 606(e)(1), the Illinois program is invalid since it more narrowly restricts the availability of emergency assistance. See the quotation from the Department's Categorical Assistance Manual, Ch. 6500, *supra* at 5, and the surrounding discussion. If, however, Congress intended to allow the states to adopt their own eligibility requirements, Illinois' program does not conflict with Section 606(e). Our task is to interpret the intent of Congress. In attempting to discern that intent, this Court is mindful that no special presumptions in favor of coverage are to be applied in interpreting provisions of the Social Security Act and that the normal tools of legislative interpretation are to be employed. *Burns* v. *Alcala,* 420 U.S. 575, 578, 95 S. Ct. 1180, 43 L. Ed. 2d 469.

As is often the case, the legislative history of 42 U.S.C. § 606(e) contains little information helpful as to Congressional intent on the crucial issue here. See Senate Report No. 744, 90th Cong., 1st Sess., 2 U.S. Code, Congressional & Admin. News, 2834, 3002-3004 (1967). Both sides in this case point to various portions of the legislative history for support of their positions, but nothing cited is conclusive.

We deem it worthwhile to note that it is clear from the Senate Report on the bill that Congress intended that families who were not eligible for AFDC should be eligible, as far as the federal Government was concerned, for emergency aid under Section 606(e). *Idem* at 3003. While this does not answer the question whether Congress intended the states to have the right to narrow the eligibility under Section 606(e), it does indicate that Congress was concerned about a broader group of needy children than Illinois' program covers. Moreover, it appears that

Congress was concerned with needy children who were approaching destitution from a variety of causes other than those recognized by Illinois. Thus the Senate Report states:

> The committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today. When a child is suddenly deprived of his parents by their accidental death or when the agency finds that conditions at home are contrary to the child's welfare, new arrangements and court referrals may have to be made. (*Idem* at 3002.)

While the legislative history is not conclusive of Congress' intent, it does show that there is no specific indication that Congress intended the states to be able to narrow the eligibility criteria, that Congress was much concerned with the emergency needs of all children approaching destitution, whether or not they were AFDC eligible, and that Congress considered that there was need for aid to needy children who approached destitution due to reasons other than those recognized in the Illinois program. We also note that the general tenor of the legislative history shows great concern for those families with children who are in need of emergency aid.

Defendants rely on the HEW regulation that interprets Section 406(e) of the Act to allow the states to set the criteria for eligibility, 45 C.F.R. § 233.1200 (1974). Defendants claim that this interpretation of the agency charged with administering the program is entitled to great weight, especially in the absence of a clear legislative intent in the provision's history. See *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 421, 93 S. Ct. 2507, 37 L. Ed. 2d 688; *Udall* v. *Talman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616. However, another regulation promulgated by HEW after the *Townsend* decision is also relevant. 45 C.F.R. § 233.10(a)(1)(ii) applies to the chapter of the Act containing Section 406(e) and provides in part:

> (ii) A State may:
>
> (A) Provide more limited public assistance coverage than that provided by the Act *only whre the Social Security Act or its legislative history authorizes more limited coverage;* [italics added].

As has been seen, there is no clear indication in the legislation or its history indicating that Congress intended to allow the states to construct narrower eligibility requirements than those in the statute. Thus it is difficult to perceive the justification for HEW's promulgation of 45 C.F.R. § 233.120. This would not be the first time that HEW has sought discretion for the states that the courts have held was not intended by Congress to be given to them. In light of these factors we do not feel it proper to rely heavily on the administrative interpretation of Section 406(e). See also *Application of Bryant* v. *Lavine*, 79 Misc. 2d 425, 359 N.Y.S. 2d 492 (Sup. Ct. 1974); *Application of Preston* v. *Barbaro*, 61 Misc. 2d 327, 305 N.Y.S. 2d 627 (Sup. Ct. 1969).

The Government notes that the *Carleson*, *Townsend*, *Burns* and *King* cases, *supra*, relied on 42 U.S.C. § 602(a)(10) which provides that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." Then the Government contends that this provision does not apply to 42 U.S.C. § 606(e) because "dependent child" is not used therein.

We believe that Sections 602(a) and 606(e) cannot be so neatly and completely severed. Section 602 sets forth what state plans must provide in order to qualify for federal reimbursement. It also contains the hearing provisions (§ 602(a)(4)), the "reasonable promptness" provisions (see *Adens* v. *Sailer*, 312 F. Supp. 923, 926 (E.D. Pa. 1970)), the state reporting provisions (§ 602(a)(6)), and others that must apply to Section 606(e) in any reasonable interpretation of the entire Act. It also appears that when Congress wished to make an exception to the generally applicable provisions of Section 602(a), it was able to do so clearly. Thus in Section 606(e)(2) Congress expressly noted that emergency assistance to migrate workers need not be statewide. This seems an apparent exception to Section 602(a)(1), requiring a state plan to be in effect in all political subdivisions of the state. The close relationship between Sections 602(a) and 606(e) leads us to believe that Congress intended that Section 606(e) be treated in the same way as Section 606(a), which also is closely related to Section 602, despite the inclusion in Section 602(a)(10) of the phrase "families with dependent children." The Supreme Court cases listed earlier in the opinion hold that Congress intended the eligibility requirements of Section 606(a) to be mandatory on the states. See, *e.g.*, *Burns*, *supra*, 420 U.S. at 578, 95 S. Ct. 1180; *Carleson*, *supra*; *Townsend*, *supra*. It therefore appears that Congress intended that the eligibility provisions of Section 606(e) be mandatory on the states, just as the courts have held with respect to the eligibility requirements of Section 606(a).

In summary, Section 606(e) is part of the same statutory scheme as Sections 606(a) and 602. The same Congressional concern with deprivation of children that brought forth the AFDC program was at the root of the emergency assistance program as well. Since the legislative history of the latter program demonstrates continuing Congressional concern with the nation's poor children and contains no indication that its eligibility provisions are to be more in state control than its closely related sister program, we must follow the number of Supreme Court cases that have held that the eligibility provisions of the federal program cannot be narrowed by the states.

Illinois, should it elect to continue to provide an emergency assistance program in the future, will still have substantial control of its program. It will be able to choose the level of benefits that it will provide and to set the standard of need. It may reasonably limit the amounts paid out in emergency assistance, *Dandridge* v. *Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, but it will not be able to declare ineligible those who come within the federal definition of eligibility in Section 606(e). This Court need not establish the exact meaning of the eligibility provisions of Section 606(e) because this case requires only that the validity of the specific Illinois program be determined. The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rule-making.[4] Such rule-making should aid the states in preparing programs that are in accord with the eligibility criteria set by Congress. Illinois may no longer conduct an emergency assistance program under Section 606(e) in which some of the families with needy children described in Section 606(e) are given aid and some are not. Because Illinois has accepted federal funds to operate an emergency assistance program, it is bound by the eligibility provisions of 42 U.S.C. § 606(e). This need not result in additional expense to the state, but with existing appropriations should at least result in helping a broader number of persons, although more moderately than at present.

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[4] Plaintiffs amended the conclusion of their main brief to request restitution for one of the named plaintiffs, Frances Gallman, who was allegedly eligible under the federal criteria when she was robbed of her monthly aid funds. Since we do not here decide the exact content of the emergency assistance program, but only hold that Illinois' present regulations are invalid, it would be inappropriate for us to decide whether Gallman was indeed eligible, particularly since HEW has not had an opportunity to make rules aiding the states and the courts in discerning the specific rules as to who is eligible. Accordingly, we decline to consider Gallman's request for restitution on this appeal.

Since we hold that the Illinois emergency assistance program defines eligibility more narrowly than 42 U.S.C § 606(e) and therefore is in violation of the Social Security Act, we need not consider whether the program violates the Equal Protection Clause of the Fourteenth Amendment or the Illinois Public Aid Code.

MAILING OF EMERGENCY ASSISTANCE CHECKS OUTSIDE COOK COUNTY

As noted, Section 402(a)(10) of the Act requires aid to be "furnished with reasonable promptness." Section 406(e) itself prescribes no time for delivery of emergency assistance, but a regulation of HEW requires that a state plan provide that "emergency assistance will be given forthwith." 45 C.F.R. § 233.120(2)(5). This accords with the Senate Report on the 1967 amendments showing that "immediate action is necessary" to alleviate "an immediate need" for emergency assistance. Sen. Rep. No. 744, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News at 3002 (1967).

Plaintiffs have not satisfied us that Judge McMillen was wrong in stating in his March 14, 1975, order that "Up to this date there has been no evidence of delays outside of Cook County * * *." If, on remand, plaintiffs can show that payments are not delivered "forthwith" in the downstate Illinois counties, the district court should require the state defendants to adopt other methods (such as disbursing orders or preposition checks) to avoid unnecessary delays in alleviating destitution. See *Purnell* v. *Edelman*, 511 F. 2d 1248 (7th Cir. 1974); *Adens* v. *Sailer*, 312 F. Supp. 923 (E.D. Pa. 1970).[5] However, if downstate payments are quickly processed and received by mail one or two days afterwards, judicial intervention will be unnecessary.

In closing, we are not satisfied that the district court's order of March 14, 1975, failed to provide plaintiffs with adequate relief with respect to the "forthwith" requirement. On remand, that court will surely retain continuing jurisdiction or otherwise afford plaintiffs further relief if they can show the necessity therefor.

The order of March 14, 1975, is affirmed. The order of November 21, 1974, is reversed insofar as it sustained the validity of the Illinois program for emergency assistance. Costs of this appeal are awarded to plaintiffs.

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[5] Since the court ordered the same delivery procedures for the downstate counties as for Cook County, we cannot agree that the court discriminated in favor of Cook County in violation of Section 402(a)(1) of the Act and 45 C.F.R. § 250.120(a).

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing.]

FINAL JUDGMENT AND DECREE

This matter comes on for entry of a final judgment and decree pursuant to prior decisions of this court and pursuant to the mandate of the Court of Appeals reversing in part and affirming in part the orders of this court to and including this court's order of March 14, 1975. The court being fully advised finds and concludes as follows:

FINDINGS OF FACT

1. Except as modified herein, the factual findings of this court's memorandum decisions of November 21, 1974, February 5, March 14, August 1, and October 24, 1975 are incorporated herein as part of this final judgment.

2. The class of plaintiffs is composed of all (1) Aid to Families with Dependent Children (AFDC) recipients, (2) applicants for AFDC and (3) other families with needy children, in Illinois who are eligible for emergency assistance within the eligibility standard of § 406(e) of the Social Security Act (the Act), 42 U.S.C. § 606(e), as set out in paragraph 9 (p. 5) below.

3. Plaintiff Frances Gallman and her family met the eligibility standard of § 406(e) at the time of their application in November, 1973, to defendant Illinois Department of Public Aid (IDPA) for emergency assistance.

4. Defendants IDPA and its directors, Edelman and Trainor, have denied and continue to deny emergency assistance to plaintiff Gallman and to members of the plaintiff class who meet the eligibility standard of § 406(e) but whose emergency need arises from circumstances other than those described in defendants' regulations, IDPA Categorical Assistance Manual, Ch. 6500, since renumbered as Ch. PO 610.5.

5. The state defendants have reported to this court the length of time taken to process requests for emergency assistance, these reports having been made pursuant to the court's order of March 14, 1975. There the court required defendants to speed up the processing of emergency assistance requests from the ‘‘not uncommon’’ 7–10 days found by the court in its order of Nevember 21, 1973,

so that emergency assistance requests will normally be disposed of within 24 hours. These reports show and I find as follows:

a. For requests for emergency assistance granted during the two reporting periods, May 8–June 9, 1975 and August 1–27, 1975, the periods of time taken for processing requests up to the time a check was ready to be placed in the mail or for pickup was more than one day in 88.8% (103 of 116) of cases in Cook County and in 71.6% (68 of 95) of cases in downstate counties:

	Cook	%	Downstate	%
Same day or 1 day	13	11	27	28.4
2–3 days	22	18.6	26	27.4
4–6 days	40	33.9	21	22.1
7–10 days	16	13.6	13	13.7
11–15 days	17	14.4	7	7.4
16–25 days	7	5.9	1	1.1
26 or more days	1	.8	0	0
Not ascertained	2	1.7	0	0
	118	99.9	95	100.1

b. For requests for emergency assistance granted during the two reporting periods (May 8–June 9 and August 1–27, 1975) four methods of delivery of emergency assistance checks were used: mail, pick up by client at fiscal management office, disbursing order at local office and by "C.D." (unexplained), as follows:

	Cook	*Downstate*
Mail	60	74
Disbursing Order	16	0
Pick-up at Fisc. Mgmt.	42	9
C. D.	0	12
	118	95

c. The amount of time from the date a check was ready for delivery by mail until receipt by the client during the two reporting periods was as follows:

	Cook	*Downstate*
1 day	31	34
2 days	8	6
3 days	0	1
4–6 days	0	1
7 or more days	1	3
Not ascertained	20	29
	60	74

Therefore, of those known, checks were delivered one or two days after mailing in 97.5 percent of cases in Cook and 88.9 percent downstate.

d. The reports demonstrate and the court finds that great and excessive delays continue to exist in the processing of emergency assistance checks, so that only a small percentage of checks are processed within 24 hours and delivered to the client within one or two days thereafter.

6. Since the mandate of the Court of Appeals was returned to this court, the state defendants have reported that they plan imminently to withdraw from the emergency assistance program authorized by section 406(e) of the Act and have further reported that they plan to provide the same limited emergency assistance available under their program which was challenged and found unlawful in this lawsuit. In so doing, defendants intend to claim federal funds for this emergency assistance program under §§ 402 and 403(a)(1) (regular AFDC funds) of the Act.

7. The state defendants have not submitted to Defendant United States Department of Health, Education and Welfare an amendment to their state plan under Title IV-A of the Act, as required by 45 C.F.R. §§ 201.3 and 205.5, setting out the proposed changes stated in Paragraph 6 above, nor have they received approval of such changes from Defendant H.E.W.

CONCLUSIONS OF LAW

8. As defined in paragraph 2 above, this is a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

9. The state defendants have violated and continue to violate § 406(e) of the Act in denying emergency assistance to plaintiff Frances Gallman and members of the class who are eligible for emergency assistance as defined in § 406(e), to wit: families with a needy child (i) under the age of 21, (ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home, (iii) where such child is without available resources, (iv) where emergency assistance is necessary to avoid destitution

of or to provide living arrangements in a home for such child, and (v) where such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment.

10. Because defendants' emergency assistance program, Categorical Assistance Manual Ch. 6500 (PO 610.5), limits its eligibility more narrowly than § 406(e) permits, its enforcement and operation are unlawful.

11. Congress, in §§ 406(e) and 403(a)(5) of the Act, has determined the terms of eligibility and funding for an emergency assistance program. The state defendants' effort to avoid the eligibility standards of § 406(e) by claiming funding for emergency assistance from funds available for AFDC or for any other federally funded program is contrary to the clear intent of the Act and a violation of § 406(e)(1).

12. Defendant United States Department of Health, Education and Welfare has violated §§ 406(e) and 402(b) of the Act, 42 U.S.C. §§ 606(e) and 602(b), and its own regulations, 45 C.F.R. § 233.10(a)(1)(ii)(A), in approving and funding Illinois' emergency assistance plan which denies such assistance to members of the plaintiff class made eligible by § 406(e).

13. Defendant H.E.W., furthermore, may not approve or fund a state's emergency assistance program, whether designated as a "special need" or otherwise, except as authorized by § 406(e).

14. The state defendants have violated and continue to violate § 406(e) of the Act and regulations promulgated thereunder, 45 C.F.R. § 233.120(a)(5), which require that emergency assistance be given forthwith, by causing, and

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failing to correct after this court's order of November 21, 1974, serious delays in providing emergency assistance to members of the plaintiff class.

IT IS THEREFORE ORDERED AND DECREED, as follows:

A. Defendants, the Illinois Department of Public Aid, Joel Edelman and James L. Trainor, their successors in office, agents, employees and assigns are enjoined, so long as Illinois receives federal funding under Title IV-A of the Social Security Act, from claiming reimbursement for emergency assistance (however designated) under any other section of the Act than §§ 406(e) and 403(a)(5) and are enjoined from using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of § 406(e), and are further enjoined from denying emergency assistance to plaintiff Frances Gallman and to any member of the plaintiff class with a needy child

(i) who is under the age of 21,

(ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home,

(iii) where such child is without available resources,

(iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and

(v) such destitution did not arise because such child or relative refused without good cause to accept employment or training for employment.

In furtherance of this injunction these defendants are specifically directed to do the following:

1. Within 7 days from entry of this order, defendants shall file with the court and with defendant H.E.W. amendments to its AFDC Categorical Assistance Manual (and to forms and other necessary instructions to staff) consistent with the terms of this order. These amendments shall

(a) Set forth the availability of emergency assistance to families with a needy child in the terms set out in (i)–(v) above.

(b) Specify that non-AFDC eligible children are eligible for emergency assistance if they meet the eligibility standards of (i)–(v) above.

(c) Pending compliance by H.E.W. with Paragraph B (p. 10) below, establish a definition of the terms "lack of available resources" and "necessary to avoid destitution" which are compatible with providing emergency assistance when a needy child is approaching destitution.

(d) Establish amounts of assistance, forms of payment and types of services to be provided.

(e) Set forth examples of common forms of destitution to be avoided by provision of emergency assistance, including, but not limited to imminent eviction, imminent termination of utilities, and lack of food, basic clothing and household furnishings.

(f) Set forth examples of common causes of such destitution, including but not limited to fire and other disaster causing homelessness or damage to personal possessions, eviction, theft, abandonment by a parent, delays in awaiting normal processing of AFDC applications, failure to receive AFDC assistance due to administrative error and failure to receive other forms of income.

2. Defendants' submission pursuant to paragraph A.1 (p. 8) herein shall not define eligibility more narrowly than § 406(e) of the Act and shall be equitable as required by 45 C.F.R § 233.10(a)(1)(ii).

3. Defendants shall review within 30 days from entry of this order the IDPA hearing decision, No. 73-4155, of March 18, 1974, denying emergency assistance to plaintiff Frances Gallman in the circumstances alleged in this complaint, and shall enter a new decision in compliance with the Court of Appeals decision and this order. Such decision shall be promptly filed with this court and defendants shall report all further action including payment made with respect to her administrative appeal.

4. In order to assist the parties and this court with further proceedings for compliance the state defendants shall, within 30 days of the entry of this order, commence to register all requests by needy families with children for emergency aid, categorizing such requests by a) type of need, b) cause of need, c) department response, and d) reasons for denial if denial of the request occurs, and shall submit to this court monthly until further order of court the information obtained from such registry.

5. Plaintiffs shall have 7 days after submission of the materials required in paragraphs A.1-4 herein in which to file comments or objections.

B. Defendant U.S. Department of Health, Education and Welfare is hereby enjoined from approving state plans for emergency assistance which limit eligibility more narrowly than § 406(e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406(e) and 403 (a)(5). In furtherance of this injunction, H.E.W. is specifically ordered as follows:

1. Within 60 days from entry of this order, it shall file with the court proposed regulations governing emergency assistance, which proposed regulations shall be in accord with the opinion of the Court of Appeals, with this order and with 45 C.F.R. § 233.10(a)(1)(ii)(A), and shall

include, inter alia, definitions of such terms as "necessary to avoid destitution" and "lack of available resources" which are compatible with providing emergency assistance when a needy child is approaching destitution.

(a) Plaintiffs shall have 15 days after submission of the proposed regulations in which to comment.

(b) Upon approval by this court and completion of procedures required by law for promulgation of regulations, defendant H.E.W. shall publish the regulations in the Federal Register and Code of Federal Regulations.

2. Within 90 days after submission of Illinois' plan for emergency assistance pursuant to Paragraph A (pp. 7-9) above, H.E.W. shall notify the court and the parties of its action in approving or disapproving the amended plan in accordance with standards set by the Act, this order and the decision of the Court of Appeals.

C. Defendants Illinois Department of Public Aid, Joel Edelman and James L. Trainor, their successors in office, employees, agents and assigns are enjoined from failing to ensure that emergency assistance grants are given forthwith to members of the plaintiff class, and are specifically directed in furtherance of this injunction to modify their procedures to provide as follows:

1. Caseworkers and necessary supervisory and other staff shall give preference to requests for emergency assistance over all other work assignments. Within 24 hours of a request staff shall verify need, determine eligibility and follow all necessary procedures to secure issuance of the emergency assistance payment, whether by disbursing order or check. This time period may not be extended except —

(a) for the time attributable to delay caused by an applicant's failure to provide essential information within his or her understanding and immediate control, or

(b) by waiver signed by the applicant for emergency aid.

Delay based upon an applicant's fault in (a) above shall be clearly described in the applicant's case record maintained by the department. In a case of waiver, the original waiver shall be maintained in the case record and the applicant shall be furnished a copy.

2. An individual requesting emergency assistance shall be advised orally and in writing during the initial interview that if eligible he or she may receive a disbursing order at the local office that day or within 24 hours of the request or, if the client prefers, a check may be mailed from Springfield or Chicago to an address provided by the client.

3. An applicant for emergency assistance not yet regularly receiving AFDC, as well as an applicant for emergency assistance currently receiving AFDC, shall have his or her emergency assistance request acted upon within the time limits of paragraph 1 above.

4. Defendant Trainor shall amend the Department's Categorical Assistance Manual to incorporate paragraphs B 1, 2 and 3 above.

(a) A copy of the amendment shall be submitted to the court not later than 15 days from entry of this order. Plaintiffs may within 10 days thereafter file comments in response thereto.

(b) Defendants shall distribute the bulletin or amendment to casework staff within 10 working days after receipt of the court's approval of it.

(c) The amendment issued in compliance with this order shall be filed with the court and shall not be modified or in any way changed without obtaining leave of court beforehand.

5. For each month beginning with the first month following entry of this order and continuing thereafter until further order of the court, defendants shall report their compliance with this order in a form substantially similar to defendants' reports of June (undated) and September 18, 1975, with additional information showing the cause for any delay greater than 24 hours from the time of request until a disbursing order or check is ready for delivery.

D. Defendant Trainor is further ordered to give notice to class members by the following methods:

1. In the next regular mailing for AFDC warrants, defendants shall enclose a notice setting out in easily understandable language the changes in emergency assistance affected by this order.

2. Within 60 days of entry of this order, defendant shall cause to be prominently displayed in all public areas of each public aid office in Illinois a poster describing in easily understandable language the material terms of this order.

3. The notice described in paragraph 1 and the poster described in paragraph 2 shall describe the type of need and possible circumstances under which emergency assistance is available and the conditions of eligibility for the program.

E. This order and compliance with this order shall not be interpreted as altering or in any manner affecting other obligations defendants have with respect to providing prompt assistance to AFDC applicants and recipients and/or providing emergency assistance to AFDC applicants and recipients pursuant to other judgments rendered prior to the date of this order or pursuant to state law.

F. This judgment shall be binding on defendants, their officers, agents, attorneys, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

G. This court shall retain continuing jurisdiction over this cause for purposes of enforcement.

H. Plaintiffs are awarded their costs in this matter.

Thomas R. McMillen,
United States District Judge

Date:..

December 1, 1975

Venus Mandley, et al., v. James L. Trainor, et al.
Motion for Entry of Final Judgment and Decree

* * *

Plaintiffs' motion for entry of final judgment and decree is denied.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Caption omitted in printing.]

MOTION TO DISMISS

NOW COME the Defendants by their attorney WILLIAM J. SCOTT, Attorney General of the State of Illinois, and move this Honorable Court pursuant to Rules 12(b)(2) and 12(h)(3) of the Federal Rules of Civil Procedure to dismiss this cause of action. In support of this their motion Defendants state as follows:

1. Effective November 21, 1975, the State of Illinois has withdrawn from participation in the Emergency Assistance Program established under Title IV of the Social Security Act, § 406(e), 42 U.S.C. § 606(e).

2. The particulars of this withdrawal are set out in the attached Affidavit of Barbara Sticher. (Attachment No. 1)

3. Notice of this withdrawal from participation in the Federal Program has been given to the United States Department of Health, Education and Welfare by Defendant Trainor, who is Director of the Illinois Department of Public Aid. (Attachment No. 2)

4. Pursuant to the terms of the notice given to HEW and the Affidavit of Barbara Sticher, the Department of Public Aid, effective the 24th of November, is no longer receiving Federal Emergency Assistance funds, nor will the Department request or expend such funds in the future, except in the instance where services were provided prior to November 21st, 1975.

5. There is no reasonable probability of a return to the conduct complained of by the Plaintiffs herein.

6. No disputed question of law or fact remains to be determined.

7. The parties lack a legally cognizable interest in the outcome of this law suit.

8. This law suit has become moot.

9. The law suit, which has become moot, is neither a case nor controversy within the meaning of Article III of the United States Constitution.

10. This Court lacks jurisdiction as no case or controversy exists between the parties.

In support of this their Motion, which incorporates the two attachments referred to above, Defendants move that this cause of action be dismissed.

Respectfully submitted,
/s/ WILLIAM J. SCOTT

WILLIAM J. SCOTT
Attorney General of Illinois

GEORGE L. GRUMLEY
Special Assistant
Attorney General
(Of Counsel)
100 North LaSalle Street
Suite 1600
Chicago, Illinois 60602
341-4693

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing.]

AFFIDAVIT

I, Barbara Sticher, Chief, Bureau of Fiscal Management of the Illinois Department of Public Aid, being duly sworn do hereby state:

1. On November 21, 1975 I was given a copy of a letter from the Director of the Department of Public Aid to the Department of Health, Education, and Welfare, in which it was stated that the Department would immediately cease all activities and requests for federal reimbursement pursuant to the "Emergency Assistance" Program, § 406(e) of the Social Security Act.

2. On Friday, November 21, 1975, I directed that, commencing Monday, November 24, 1975, no requests for funds pursuant to § 406(e) of the Social Security Act for assistance requested on or after November 24, 1975 should be funded pursuant to § 406(e) of the Social Security Act.

3. I have directed that no additional § 406(e) federal funds be drawn for the balance of the October through December quarter of the current fiscal year.

4. The Department has submitted to the Department of Health, Education, and Welfare revised estimates for the January through March quarters of the current fiscal year to reflect the fact that the Department has eliminated all activities pursuant to § 406(e) of the Social Security Act as of November 24, 1975.

/s/ BARBARA R. STICHER

BARBARA STICHER, Chief
Bureau of Fiscal Management

[Jurat omitted in printing.]

EXHIBIT 2

STATE OF ILLINOIS
DEPARTMENT OF PUBLIC AID

JAMES L. TRAINOR
Director

316 South Second Street
Springfield, Illinois 62762

November 21, 1975

Mr. Clyde V. Downing
Acting Regional Commissioner
Social and Rehabilitation Service
Department of Health, Education,
and Welfare – Region V
300 South Wacker Drive
Chicago, Illinois 60606

Dear Mr. Downing:

This letter constitutes the Illinois Department of Public Aid's official notification to the Department of Health, Education, and Welfare that Illinois shall not request reimbursement pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e)) for any expenses incurred after November 21, 1975, as the Department is terminating its program for "Emergency Assistance to Needy Families with Children" existing pursuant to said § 406(e). The Department will process requests for Emergency Assistance pursuant to said § 406(e) up to and including November 21, 1975 and shall request federal reimbursement for such requests made by that date but paid after November 21. In no event shall the Department be requesting reimbursement for any expenses pursuant to said statute where the request for "Emergency Assistance" was made after November 21, 1975.

Adjusted estimates will be submitted.

We will soon be writing to you formally requesting clarification of aspects of the Emergency Assistance Program.

Very truly yours,

/s/ JAMES L. TRAINOR
James L. Trainor
Director

JLT:san
cc: Mr. John Kelly

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing.]

MOTION

The Secretary of Health, Education and Welfare by Samuel K. Skinner, United States Attorney for the Northern District of Illinois, hereby moves to dismiss the above-captioned cause pursuant to Rules 12(b)(2) and 12(h)(3) of the Federal Rules of Civil Procedure on the ground that the above-captioned action is moot.

Respectfully submitted,

/s/ SAMUEL K. SKINNER

SAMUEL K. SKINNER
United States Attorney

[Affidavit of mailing omitted in printing.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Captions omitted in printing.]

PLAINTIFFS' ANSWER TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs by their attorneys answer the motions to dismiss on grounds of mootness filed by defendants Trainor, the Illinois Department of Public Aid and the United States Department of Health, Education and Welfare on December 1 and 8, 1975, respectively, as follows:

Plaintiffs deny that the Illinois defendants have withdrawn from a federally funded emergency assistance program and deny that the federal defendant is not now providing (and in the future will not continue to provide) federal funds under the Social Security Act (Act) to the Illinois defendants for a program declared illegal by the court of appeals.

Plaintiffs further answer that defendants are attempting to deceive this court and the court of appeals by purporting to withdraw from the emergency assistance program created by Congress in § 406(e) of the Act while at every moment they are maintaining the same emergency assistance program, with all its discriminations found to be illegal, with federal funds secured under § 402 of the Act [regular AFDC funds].

Plaintiffs aver that this is a sham and a purloining of federal funds which cannot be tolerated by a federal court of equity. Plaintiffs further aver that defendants' behavior is obdurate and in bad faith which entitles plaintiffs to an award of damages and attorneys fees.

Specifically, plaintiffs answer defendants allegations made in support of their mootness motions as follows:

ANSWER TO DEFENDANT U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

1. Plaintiffs deny that this court lacks jurisdiction over the federal defendant or the subject matter. Plaintiffs deny that this action is moot. Plaintiffs further aver that the federal defendant intentionally and in conspiracy with the Illinois defendants has failed to reveal certain facts which establish that the federal defendant intends to approve and fund and in fact has approved and is funding the same Illinois emergency assistance program as was declared unlawful by the federal court of appeals in this lawsuit, and that Illinois in complicity with the federal defendant intends to operate and in fact is operating the same emergency assistance program declared illegal.

ANSWER TO DEFENDANTS TRAINOR AND THE ILLINOIS DEPARTMENT OF PUBLIC AID

1. Plaintiffs deny the facts asserted in paragraph 1 of the motion and further aver that the Illinois defendants continue to operate their Emergency Assistance Program and continue to claim federal funds therefor.

2. Plaintiffs have insufficient knowledge either to admit or deny the facts asserted in the Affidavit of Barbara Sticher incorporated into paragraph 2 of the motion and further aver that the affidavit is insufficient in law because the affidavit fails to lay a proper foundation for the facts attempted to be proved by the affidavit, including the affiant's competence to testify concerning the material facts asserted by her, and plaintiffs aver that in fact the affiant is not competent to testify to such facts.

3. Plaintiffs have insufficient knowledge either to admit or deny the facts asserted in paragraph 3 of the motion and further aver that the "notice" set out in Attachment No. 2 to defendants' motion is not in compliance with H.E.W. regulations controlling amendments to a State Plan for Aid and Services for Needy Families With Children. 45 C.F.R. §§ 201, et seq.

4. Plaintiffs deny the facts asserted in paragraph 4 of the motion and further aver that defendants have since November 24, 1975, claimed and will continue thereafter to claim federal funds for emergency assistance payments and services provided to members of the plaintiff class prior to and after November 21, 1975.

5. Plaintiffs deny the facts asserted in paragraph 5 of the motion and further aver that defendants are currently engaging in and will continue to engage in the conduct complained of in plaintiffs' amended complaint. In support of this statement, plaintiffs further state as follows:

- a. Plaintiffs attach hereto and incorporate herein *Plaintiffs' Exhibit 1* to this Answer, which is Defendant Trainor's report to the Illinois Legislative Advisory Committee on Public Aid concerning compliance with the court of appeals' decision in the within case. *Plaintiffs' Exhibit 2,* which is a motion made and passed by the Illinois Legislative Advisory Committee on Public Aid on November 17, 1975, and *Plaintiffs' Exhibit 3,* which is the affidavit of Michael F. Lefkow pertaining to Plaintiffs' Exhibits 1 and 2.
- b. Plaintiffs call the court's particular attention to Exhibit 1 in which Defendant Trainor sets forth three alternatives with respect to the court of appeals' decision, one of which is Alternative B. Alternative B proposed to "Eliminate the 606(e) Emergency Assistance Program" and it was rejected: "The Department, although believing this alternative to be legally acceptable, finds this alternative totally unacceptable."

- c. In light of Plaintiffs' Exhibits 1, 2 and 3, plaintiffs aver that defendants have not eliminated their Emergency Assistance Program as set out in their motion to dismiss.
- d. Plaintiffs further aver that the Illinois defendants intentionally and in conspiracy with the federal defendant H.E.W. have failed to reveal certain facts which establish that the Illinois defendants intend to operate and in fact are operating the same emergency assistance program as was declared unlawful by the federal court of appeals in this lawsuit, that the Illinois defendants intend to claim and in fact are claiming federal funds for that illegal program, and that defendant Department of H.E.W., in complicity with this evasion of the court of appeals' decision, intends to authorize federal monies to be disbursed for Illinois' unlawful program.

6. Plaintiffs deny the assertion in paragraph 6 of the motion and to the contrary assert that important questions of both fact and law exist and that this court must set this matter for an evidentiary hearing to determine the facts before a ruling can be entered on the motions to dismiss. Plaintiffs further aver that if final judgment for plaintiffs is not entered because the court finds the defendants are not and do not intend to claim, use and disburse federal funds for an emergency assistance program, the following issues must be decided by the court:

(a) Whether Illinois law, Ch. 23, Ill. Rev. Stat., § 12-4.5, prohibits the state defendant from refusing to claim federal funds available for an emergency assistance program and if that is not resolved in plaintiffs' favor;

(b) Whether the state defendants' discriminations, found illegal under the Social Security Act by the court of appeals, violates the Equal Protection Clause of the Fourteenth Amendment; and if that is not resolved in plaintiffs' favor;

(c) Whether the state defendants' emergency assistance program satisfies the requirements of Illinois law, Ch. 23, Ill. Rev. Stat., § 12-8, for an emergency assistance program.

7. Plaintiffs deny the assertions of paragraph 7 and to the contrary assert that plaintiffs continue to have a legally cognizable interest in this lawsuit.

8. Plaintiffs deny the assertions of paragraph 8 and to the contrary assert that this case is not moot and that plaintiffs are entitled to final judgment in their favor.

9. Plaintiffs deny the assertions of paragraph 9 and to the contrary assert that a case of controversy continues to exist between plaintiffs and defendants and that plaintiffs are entitled to final judgment in their favor.

10. Plaintiffs deny the assertions of paragraph 10 and to the contrary assert that this court has jurisdiction and is obliged to enter final judgment on behalf of plaintiffs.

WHEREFORE, plaintiffs pray that the motions to dismiss be denied at once, or alternatively that this matter be set down for hearing to determine the facts, which plaintiffs believe will show that they are entitled to final

judgment in their favor and that the motions to dismiss must be denied. Plaintiffs further pray for an award of damages and attorney fees because of the defendants' bad faith and obdurate behavior.

/s/ MICHAEL F. LEFKOW
Michael F. Lefkow, one of the
attorneys for plaintiffs.
STEPHEN G. SELIGER
Cotton, Watt, Jones, King & Bowlus
One IBM Plaza
Chicago, Illinois 60611.

MICHAEL F. LEFKOW
4655 South Michigan Avenue
Chicago, Illinois 60653

EXHIBIT 1

10-30-75

I. STATUS OF LITIGATION

A. The Federal District Court ruled that the scope of the Department's 606(e) Emergency Assistance Program was legal, but it retained jurisdiction to supervise the speed of delivery of Emergency Assistance.

B. On appeal, the U.S. Court of Appeals for the Seventh Circuit ruled that the program was illegal, as it restricted the persons eligible for Emergency Assistance to a group smaller than all persons eligible for AFDC. The opinion made clear that the Department had the option at any time to discontinue its 606(e) program.

C. The Department petitioned the Court for a Stay of the issuance of the Mandate and a clarification of the Order so as to allow the Department to seek Supreme Court review of the Seventh Circuit's opinion while being protected against contingent liability. Such a Stay, if granted, would have allowed the Department to maintain its current Emergency Assistance Program during the Appellate process. The Seventh Circuit denied such Petition for Stay.

II. ALTERNATIVES

A. Maintain the 606(e) Program.

Because of the denial of the Stay, the District Court can now be expected to direct the Department (if it decides to continue the program) to draw up a new Emergency Assistance plan affording eligibility for Emergency Assistance to *all* persons eligible for AFDC. Under our current Emergency Assistance Program, Emergency Assistance is limited, in general, to persons who have been burned out of their homes. The Seventh Circuit's opinion would require the Emergency Assistance Program to be offered to any AFDC recipient in a situation of financial destitution, thereby including a person who alleged that they have had cash stolen or even arguably those persons who have become destitute by gambling away their assistance money. The Seventh Circuit's opinion implied that the Department could "reasonably" limit its expenditures under an Emergency Assistance Program. But even if the Department could so limit (and the Department feels the Plaintiffs would argue against any such limitations), the results would be to divide a limited amount of Emergency Assistance money among a very expanded group of individuals, thus reducing the amount of assistance paid in each individual case to a meaninglessly small amount. The agency is thus faced with the prospect, if it continues the program, of potentially unlimited financial expenses, if it meets actual need in Emergency Assistance payments, or the payment of meaninglessly small amounts (and the possibility of legal challenge and subsequent mandatory order of additional financial payments).

The Department spent approximately $500,000 on its 606(e) program for which it requested federal reimbursement during fiscal year 1975. Prior to the Flat Grant, when the 606(e) Emergency Assistance Program had a wider scope, the Department had spent in the neighborhood of one and one-half million dollars annually for which it applied for federal reimbursement. As the definition of Emergency Assistance would have to be even wider than the definition had been prior to Flat Grant, and as the number of AFDC recipients has increased, the one and one-half million dollars would constitute a significant under-estimate of what the program would cost. Because of the open ended nature of the definition of "eligibility" and "destitution", it is impossible to project any limitations on the maximum cost of the program.

B. Eliminate the 606(e) Emergency

Assistance Program.

Under the law we are entitled to eliminate the program. Plaintiffs have argued in the lawsuit that there is a state law requirement for an Emergency Assistance Program. The Department does not believe this argument to be true. In any event, if such a requirement exists, the program would not have to be of such breadth as the program required by the Seventh Circuit's opinion.

The Department, although believing this alternative to be legally acceptable, finds this alternative totally unacceptable. The Department believes that certain Emergency conditions, such as homelessness through burnouts are needs which the Department of Public Aid clearly ought to meet and the Department would not wish to curtail its ability to do so.

C. Eliminate 606(e) Program and Create a Program for Meeting Emergent Burnout Cases to be Funded Under Section 602 and Section 603.

This is the alternative recommended by the Department. IDPA proposes to create a special need item (for which it would apply to the Federal Government for reimbursement at the usual 50% rate) as part of the regular AFDC program. Such a program would not cost the Department significantly more than the present program as the only increase in expenditures would be for people who were burned out more than once in a 12-month period. (Payments for two emergencies to the same receiving unit within a 12-month period are not reimbursable under the Section 606(e) provisions.) Should for some reason the Federal Government protest the creation of such a special need item, the situation would have to be reevaluated. At the present time we believe the Federal Government would approve funding such a special need program.

Simultaneously, we would request (as the Seventh Circuit suggested) that HEW clarify its 606(e) Emergency Assistance Program. There are aspects of a 606(e) program that we feel superior to a special need program and we would prefer, if so allowed, to maintain the 606(e) Emergency Assistance Program of the present scope.

Finally, an additional reason for this recommendation is that the District Court has retained jurisdiction over the entire matter to supervise our speed of delivery. If the District Court were to rule that we were legally required to maintain a delivery system that we could not fulfill, we would have to eliminate the program in any event. This rapidity of delivery issue also is one in which we could ask clarification from the Department of Health, Education and Welfare, and we would be in a better position upon such clarification to decide if a better position upon such clarification to decide if a new 606(e) Emergency Assistance Program should be maintained.

EXHIBIT 2

Move that the Legislative Advisory Committee On Public Aid approve for a 5 month period the plan as recommended by Director Trainor to handle emergency burn-outs to be funded under Section 602 and 603 and to report back to the Committee at its April 1976 meeting with the results of this program and his recommendation to handle other special emergency needs which may not have been met; and that Director Trainor request from H.E.W. clarification of its emergency assistance program as suggested by the United States Court of Appeals; and that Director Trainor investigate and study a purely State program to define and meet emergency needs; and that Director Trainor investigate and study the feasibility of creating a special catastrophic occurrence as a special need under the flat grant program.

EXHIBIT 3

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing.]

AFFIDAVIT OF MICHAEL F. LEFKOW

I, MICHAEL F. LEFKOW, being first duly placed upon affirmation, state as follows:

1. I have knowledge of the facts contained herein and could testify competently thereto if called as a witness.

2. On or about November 11, 1975, I received through the United States mail a notice from the State of Illinois Legislative Advisory Committee on Public Aid announcing that it would meet on November 17, 1975, to consider an agenda which included as item number III, "IDPA EMERGENCY ASSISTANCE PROGRAM (MANDLEY v. TRAINOR, U. S. COURT OF APPEALS DECISION." The agenda and notice are attached hereto as Exhibits A and B respectively.

3. The Legislative Advisory Committee is created by Illinois law, Ch. 23, Ill. Rev. Stat., § 12-14 (statute attached as Exhibit C), and has 12 members: six senators and six representatives.

4. On Monday, November 17, 1975, I attended a meeting of the Legislative Advisory Committee on Public Aid which commenced at 1:00 p.m. in Room 1-A of the State Office Building at Springfield, Illinois. Eight committee members responded present to the roll call of members.

Also present were Mr. James L. Trainor, Director of the Illinois Department of Public Aid (IDPA) and defendant herein, members of his staff, and members of the public. A stenographic record of the proceedings was made.

4. When the Committee reached agenda item number III, the Chairman, Senator Donald A. Moore, asked defendant Trainor to present the IDPA's recommendation on how the IDPA proposed to comply with the court of appeals decision in this case. Defendant Trainor directed the members' attention to his three-page recommendation dated 10-30-75 (attached hereto as Plaintiffs' Exhibit 1), previously distributed to the Committee with a cover letter, and paraphrased the contents. Defendant Trainor stated that he rejected withdrawal from the emergency assistance program; that elimination of the emergency assistance program was totally unacceptable to the IDPA. Defendant Trainor further stated that the IDPA could and would maintain the same emergency assistance program it now has by applying for federal funds under §§ 602 and 603 [§§ 402 and 403 of the Social Security Act (Act)]. Defendant Trainor further stated that he believed the U. S. Department of Health, Education and Welfare, also a defendant herein, would approve this plan and disburse federal funds to the IDPA for its emergency assistance program under §§ 602 and 603 rather than under § 606(e) [§ 406(e) of the Act].

5. After several committee members briefly questioned defendant Trainor, Senator Monroe L. Flinn read a written motion to approve defendant Trainor's plan to receive federal funds under §§ 602 and 603. The motion was seconded and upon a vote was carried, 7 ayes, 1 nay. Mrs. Gail E. Chesnut, Executive Secretary of the Committee, provided me with a copy of the motion, attached as Plaintiffs' Exhibit 2, after the meeting adjourned.

6. Subsequent to the meeting Senator Donald A. Moore identified for me Plaintiffs' Exhibit 1 as a copy of the original 10-30-75 recommendation forwarded to him by defendant Trainor.

7. Further affiant sayeth not.

MICHAEL F. LEFKOW

[Jurat omitted in printing.]

EXHIBIT A

LEGISLATIVE ADVISORY COMMITTEE ON PUBLIC AID

Monday, November 17, 1975 – 1:00 p.m.
Room A-1, State Office Building

I. Roll Call of members.

II. Preliminary review of Medicaid hearings held on October 15th and 16th.

III. IDPA Emergency Assistance Program (Mandley v. Trainor, United States Court of Appeals decision.

IV. Review of override of Governor's veto of LAC Bills.

V. Progress report on follow-up of problems of delayed payments by IDPA to Cook County, Oak Forest Hospitals and investigation of the Von Solbrig Hospital and Northeast Community Hospital.

VI. Review of IDPA Regulations, defining SB 1147's language governing ages 18–21 living independently.

VII. Testimony by Assistant State's Attorney, St. Clair County, Rosa Gossage on progress in prosecuting welfare fraud cases at county level.

VIII. Review of progress by IDPA and Office of Attorney General in enforcing claims and penalties including child support payments as provided in the Public Aid Code.

IX. Review of the administration of Federal Food Stamps Program.

X. Review of the status of Budget Counseling and Medichek Program.

XI. Review of the General Assistance Program.

EXHIBIT B

STATE OF ILLINOIS

LEGISLATIVE ADVISORY COMMITTEE ON PUBLIC AID

Room 4c – State Office Building
Springfield, Illinois 62706
Telephone: 217/782-7761

November 7, 1975

MEETING NOTICE

The next meeting of the Legislative Advisory Committee On Public Aid will be held on Monday, November 17, 1975 at 1:00 P. M. in Room A-1 of the State Office Building.

Enclosed is the Agenda for the meeting.

Sincerely,
/s/ DON A. MOORE
Don A. Moore, Chairman

EXHIBIT C

C. Legislative Advisory Committee

§ 12-14. Membership – Powers and Duties.

A legislative Advisory Committee on Public Aid, composed of 6 members of the House of Representatives appointed by the Speaker thereof and 6 members of the Senate appointed by the President thereof, shall exercise the powers and duties herein prescribed relevant to the policies and administration of the public aid programs established by this Code.

No more than 3 members appointed from each House of the General Assembly shall be of the same political party. The members shall be appointed in each odd-numbered year prior to July 1.

[Affidavit of service omitted in printing.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing.]

SUPPLEMENT AND AMENDMENT TO PLAINTIFFS' ANSWER TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs by their attorneys supplement and amend their answer to the defendants' motions to dismiss with Plaintiffs' Exhibits 4 and 5.

Plaintiffs' Exhibit 4 is a copy of defendant Trainor's testimony to the State of Illinois Legislative Advisory Committee on Public Aid which relates his decision not to abandon, but rather to continue, federal funding of defendant Illinois Department of Public Aid's emergency assistance program without removing the discriminations held illegal by the court of appeals. He intends to block further judicial review of his illegal conduct by temporarily suspending funding the emergency assistance program under § 406(e) and instead will fund it under § 402 for an interim period. His conduct in this court – revealing only one-half of his plan – is in furtherance of the scheme he proposed to the Illinois legislators and is a deliberate attempt to deceive this court and evade the court of appeals' decision.

Plaintiffs' Exhibit 5 is the affidavit of plaintiffs' counsel, Michael F. Lefkow, which authenticates plaintiffs' Exhibit 4.

/s/ MICHAEL F. LEFKOW

One of the Attorneys
for Plaintiffs.

EXHIBIT 4

* * *

Federal, but the actual payment for exams, laboratory work, et cetera, is a Medicaid function and I think is Federal funds. I know a large part of it is, I don't know if it is one hundred percent.

CHAIRMAN MOORE: Thank you very much, Doctor. I know that the Committee is aware that you have one of the only operational PSRO's in the State. The Committee is concerned about preventive medicine. There is a problem. When you get a child at a very early age we can ultimately, hopefully, get him and save the State a lot of money in the future, and we appreciate your starting such a pilot program. Thank you, again, for coming down.

DR. RAY: Yes, sir.

CHAIRMAN MOORE: Let's go to Item III – Illinois Department of Public Aid Emergency Assistance Program, *Mandley versus Trainor*, U. S. Court of Appeals decision.

Director Trainor, I think – may I see a show of hands of individuals who desire to make statements on this particular question right now?

I know I do have a memorandum from the Illinois Welfare Rights Organization. I know the members of the Committee, Director, did receive the memorandum you had sent to me. Perhaps we could hear from the opponents here on this matter and then perhaps you could rebut at that time and go into your proposal.

A memorandum was delivered to me today by Mr. Lefkow, one of the Legal Aid Attorneys.

Who would like to say a few words on this matter?

MR. LEFKOW: My name is Michael Lefkow. I do not intend to address the Committee, other than to inform it that Mrs. Ruby Mabry, who is the Chairwoman of the Illinois Welfare Rights Organization, which is the plaintiff in the lawsuit, had this fact sheet prepared, and believes that it is a fact sheet, and I think the Committee is well aware of the position, or the stand of the State Welfare Rights Organization and that there should be a fully Federally funded emergency assistance program, so I hope the Committee will excuse Mrs. Mabry. There was, apparently, a death in the family and she was called to the State of Oklahoma.

CHAIRMAN MOORE: Did you prepare the statement, or was it prepared by someone else?

MR. LEFKOW: The statement was prepared by the Illinois Welfare Rights Organization. I am General Counsel for that organization.

CHAIRMAN MOORE: I have just one very fast question. What emergency needs must be met? I am looking at question number 3. "Food, clothing and shelter are among the basic needs that must be met."

Where did that statement come from?

MR. LEFKOW: That is Mrs. Mabry's statement, I believe.

CHAIRMAN MOORE: Is there a Federal regulation that sets forth the basic needs as being food, clothing and shelter, to your knowledge?

MR. LEFKOW: I think that it might be inappropriate for me to testify as to, Senator Moore, any of the matters. I just really wanted to advise the Committee of Mrs. Mabry's absence, and I am just acting as the attorney in the case.

I prefer not to do it. Mrs. Tillman from the Council for Community Services in Metropolitan Chicago will be a witness today. Thank you.

CHAIRMAN MOORE: Thank you. Director Trainor? Do you want to proceed on what you think the solution to the decision of Mandley vs. Trainor should be and your rationale behind it?

DIRECTOR TRAINOR: Yes, sir. We basically have several objectives. One is to eliminate the emergency assistance program, which is optional under the law and the regulation, or to attempt to completely State fund the program, but given the Mandley decision, we would be creating in effect nothing more than a legal challenge in the State court on the same basis.

We could attempt to redefine the program within the Mandley decision. However, again, my friends and colleagues to my right would again file a suit on the question.

Rather than doing that, I think that the Court gave us some guidance, such as it is. The options that I would choose to exercise at this point is to follow the Court mandate, and that is to suspend the present program and seek to obtain from HEW a definition of an emergency assistance program.

Pending that definition and so that people would not in fact be destitute and, essentially, homeless or burn out cases, we would create a new program under AFDC and recognize a special need covering essentially the same items that we now cover under what the Court says is an invalid emergency assistance program.

CHAIRMAN MOORE: How would burnouts be handled?

DIRECTOR TRAINOR: They would be handled essentially in the same way they are now. If a person comes to an office and demonstrates a need for such type of assistance, they would be able to obtain it. Only rather than under an emergency assistance program under the special needs category AFDC program.

CHAIRMAN MOORE: In other words, it would not be under 606(e), but would be under 602 and 603?

DIRECTOR TRAINOR: That's correct.

CHAIRMAN MOORE: My main concern, I will be very honest with you, are burnouts, catastrophe losses, stolen warrants.

What would be the situation with the stolen warrants?

DIRECTOR TRAINOR: Well, let's take it – stolen warrants, at this point we already are under a mandate in the *Randall vs.* – I don't know if it was *Edelman, Swank* or myself.

(Discussion off the record.)

DIRECTOR TRAINOR: They have changed it. It is now *Randall vs. Trainor.*

CHAIRMAN MOORE: They got it right now.

DIRECTOR TRAINOR: Well, you know, they update these things.

But under that, we are mandated to replace lost or stolen warrants within a certain percentage of time, and the Department's record for the month of October was that within three days from the time the person reported the lost or stolen warrant, we had replaced 85.9 percent of those. Within four to seven days we replaced another 13.3 percent, so the Department right now is replacing within seven days 99.2 percent of lost or stolen warrants.

CHAIRMAN MOORE: Very good.

DIRECTOR TRAINOR: Now, in terms of the catastrophic situation, at any time under HEW regulations, we can recreate an emergency assistance program. Pennsylvania during the floods in fact did that. They had no emergency assistance program. They went ahead and created one, so if we had a tornado or some other catastrophe, or a wreck or something like that, we could in fact create an emergency assistance program.

CHAIRMAN MOORE: Senator Dougherty?

SENATOR DOUGHERTY: I was just going to ask the Director, in view of this decision then, you feel you have an adequate method of dealing with this? You are right under the gun, as I read the decision.

DIRECTOR TRAINOR: Yes, sir, I think the Judge expects me to do something one of these days.

SENATOR DOUGHERTY: But it can be done. I would suggest there is nothing else we could do in view of this situation. Have you outlined any plans that you might want to suggest?

DIRECTOR TRAINOR: Well, I think the Court correctly recognized that the problem with this program is a lack of definition.

SENATOR DOUGHERTY: We need a Dr. Hayikawa, in other words.

DIRECTOR TRAINOR: In effect, but we do need a definite, well thought out, vital emergency assistance program and what that should include, and the Court did say that the Department should seek to do that.

SENATOR DOUGHERTY: You have no objection?

DIRECTOR TRAINOR: No, sir. As a matter of fact, I intend to do that.

CHAIRMAN MOORE: Do I understand the recommendation, Director, is that your emergency burnouts would be funded under Section 602 and 603, is that correct?

DIRECTOR TRAINOR: Yes, sir.

CHAIRMAN MOORE: And you temporarily would suspend then Section 606(e)?

DIRECTOR TRAINOR: Yes, sir.

CHAIRMAN MOORE: What other items are covered besides burnouts that the Court declared unconstitutional?

DIRECTOR TRAINOR: Well, we cover essentially four items – homelessness, where the family is without shelter as a result of damage to the building, rendering it uninhabitable; court ordered eviction, where the court order occurs for reasons other than the recipient's failure to pay rent; potentially homeless, where the family is potentially homeless through damage to a portion of the building or of its contents, and the applicant in need of initial eligibility, where a client is determined eligible or presumed eligible to receive cash for clothing, household furnishings and equipment. Those are the four items that are covered.

CHARIMAN MOORE: And now we would restrict that to –

DIRECTOR TRAINOR: – The same four items would be covered under a new program under 602 and 603.

CHAIRMAN MOORE: Are there any other items that would be available – 602(e), that pertained only to AFDC, to recipients or eligible recipents?

DIRECTOR TRAINOR: Well, that is the problem. That is what the Court ruled that we could no longer do.

CHAIRMAN MOORE: We have to open it up to everybody?

DIRECTOR TRAINOR: We opened it up. I think this is the case where the advocates won more than they could really hope to achieve.

CHAIRMAN MOORE: Director, would you have any objection, on the recommendation of this Committee, to going with this thing for maybe a four or five month period and reporting back to us?

I do have some concern as far as the effect of the decision. In fact, it is sort of unfortunate the decision was ever granted in view of the posture we may be in. Would you report back to the Committee at its April meeting as to how the new system is going?

I am sure we will hear from the welfare community if it is not going well.

In addition to seeking clarification from HEW, which was suggested to you in the opinion of the U. S. Circuit Court of Appeals, also to investigate and study perhaps the totally State funding of this matter. We would be eligible under 602 and 603 for 50/50 match. If we go from $500,000 to $2 million, it is going to cost the State of Illinois $1 million and the Federal $1 million. It might be easier for us to take the whole program over in the State, which would cost $800,000, for example. In other words, there might be a potential cost savings if it were through an ADC situation, and also the possibility of investigating the feasibility of creating a special catastrophic occurrence as a special need, or an exception to the flat grant program.

Would you have any objection to that?

DIRECTOR TRAINOR: No, sir.

CHAIRMAN MOORE: Any questions of the Committee?

REPRESENTATIVE CATANIA: Mr. Chairman:

CHAIRMAN MOORE: Representative Catania:

REPRESENTATIVE CATANIA: Thank you, Mr. Chairman. Director Trainor, when you mentioned the length of time it took to replace a check when it was stolen, by "replace", do you mean those checks were then actually in the hands of the people who had reported the loss?

DIRECTOR TRAINOR: Yes, ma'am, that is what I do mean.

REPRESENTATIVE CATANIA: How soon do you expect to be able to have a plan working that should satisfy the Court?

DIRECTOR TRAINOR: That depends on the definition that they give to emergency assistance. The Court, rather than defining what an emergency assistance program was, rather cleverly said that was not their duty, that it is up to the Department and HEW, so that now we have to seek HEW guidance on what is an emergency assistance program.

REPRESENTATIVE CATANIA: I assume you have already sought that guidance?

DIRECTOR TRAINOR: No, ma'am, I have been waiting the outcome of this meeting.

CHAIRMAN MOORE: I might add, Representative Catania, that the Director, as of about seven or eight days ago, was coming close to being held in contempt of court. I did give him a letter which was apparently helpful, inasmuch as he is mandated to bring this before this Committee, and the earliest time we could have had a meeting was today, so apparently that letter was forwarded to the Judge and you are awaiting some advice from the Committee today?

DIRECTOR TRAINOR: I am awaiting your advice and of counsel, yes, sir.

CHAIRMAN MOORE: I do have a memo from Representative Mann expressing his opinion, and for the record I would like to state that he thinks:

> "The Department should not withdraw from Federally funded emergency assistance, and that the Department should comply with the Court of Appeals decision and have a full program."

That message was given to me over the telephone. It came in over the telephone. I would like the record to so reflect.

Are there any other questions? Representative Campbell:

REPRESENTATIVE CAMPBELL: Mr. Chairman, for purposes of a motion, I move that the Legislative Advisory Committee on Public Aid approve for a five month period the plan as recommended by Director Trainor to handle emergency burnouts, to be funded under Sections 602 and 603, and to report back to the Committee at its April, 1976 meeting with the results of this program and his recommendation to handle other special emergency needs which may not have been met, and that Director Trainor request from HEW clarification of his emergency assistance program as suggested by the U. S. Court of Appeals, and that Director Trainor investigate and study a purely State program to define and meet emergency needs, and that Director Trainor investigate and study the feasibility of creating a special catastrophic occurrence as a special need under the flat grant program.

CHAIRMAN MOORE: You have heard the motion. Is there a second?

REPRESENTATIVE FLINN: Second.

CHAIRMAN MOORE: Seconded by Representative Flinn. On that question the Secretary will take the roll.

MS. CHESNUT: Representative Campbell:

REPRESENTATIVE CAMPBELL: Aye.

MS. CHESNUT: Representative Catania:

REPRESENTATIVE CATANIA: Aye.

MS. CHESNUT: Representative Davis:

(No response)

Senator Dougherty:

SENATOR DOUGHERTY: Aye.

MS. CHESNUT: Representative Flinn:

REPRESENTATIVE FLINN: Aye.

MS. CHESNUT: Representative Kempiners:

REPRESENTATIVE KEMPINERS: Aye.

MS. CHESNUT: Senator Lane:

(No response)

Representative Mann:

(No response)

Senator Moore:

SENATOR MOORE: Aye:

MS. CHESNUT: Senator Ozinga:

(No response)

Senator Schaffer:

SENATOR SCHAFFER: Aye.

MS. CHESNUT: Senator Smith:

SENATOR SMITH: Mr. Chairman:

CHAIRMAN MOORE: Senator Smith:

SENATOR SMITH: Realizing the deep need to define and review so we can come up and comply with the rules of HEW, I still can't overlook the fact that until the time specified in my friend's amendment that was passed or lapsed, and that there will be a problem after the Director will have contacted HEW with time for him to draft such acceptable legislation and leaving these people in limbo, as I think they are now, I am recalling as I talk the fact that we have set up welfare stations throughout the State in convenient places, so that rather than contact us here in Springfield in emergencies such as we have discussed here on the four matters that are involved, that they will apparently be no better prepared and perhaps not as well prepared to receive some emergency assistance. There is no way under high heaven they could be. Therefore, I must vote nay.

CHAIRMAN MOORE: All right, gentlemen, on this question there are seven "ayes", one "nay", and the motion carries.

Mrs. Tillman, I inquired before whether or not anyone desired to speak. Then there was a conference back there and –

MRS. TILLMAN: Well, the problem was, I was not speaking for the Welfare Rights Organization. I was going to speak for the Council of Community Services, so we got caught in the shuffle.

CHAIRMAN MOORE: It was not the intention of the Chair to prevent you from testifying, if you so desired. Do you want to say a few words, or –

MRS. TILLMAN: I think it is a little past the point, I think, in terms of what I have to say.

CHAIRMAN MOORE: I think the Committee does have some concern and some reservations, as you will note from the other directions that were given to the Director on this point.

This matter will be back on our agenda at the April meeting, and I assume that the good judges of the U. S. Court of Appeals will continue the case again until after that meeting, Director, but I think that the Committee – there is a problem. It is just unfortunate the decision came down in the first place.

SENATOR SMITH: Mr. Chairman:

CHAIRMAN MOORE: Senator Smith:

SENATOR SMITH: May I ask a question of you or of the Director, either or both?

When you were speaking of that decision you brought something back to my mind, a communication that we received from the Director demanding, in the light of the Court's ruling, that an answer be had by, I think, December – no, by the 7th of something.

CHAIRMAN MOORE: November, I think.

SENATOR SMITH: I am informed the 7th of September.

Now, have you answered the Court or has anyone, to your knowledge? I am trying to determine whether the Court has finalized –

CHAIRMAN MOORE: If I could reply, Senator Smith: Because this Committee could not have a meeting prior to November 7th, I delivered to the Director a letter stating that this would be the earliest time the Committee could have a meeting under Chapter 23, Section 1214, which it was required to do, and he in turn used this letter, I believe, with the Court of Appeals to stall them pending our decision today, so that he could then go ahead and then implement the order.

SENATOR SMITH: May I then ask a question of the Director.

Did you deliver such a letter?

DIRECTOR TRAINOR: I gave it to the attorneys handling the case. The use they have made of it I don't know, but as far as I know, I am not in contempt of court right as of this moment.

CHAIRMAN MOORE: All right, we will proceed.

Director, Item V, a progress report on follow-up of problems of delayed payments by the Department to Cook County, Oak Forest Hospitals, and the investigation on the Von Solbrig and Northeast Community Hospitals.

Mrs. Gossage, are you under any special time period?

MRS. GOSSAGE: I should be out of here before 4:00.

CHAIRMAN MOORE: All right, Director, go ahead.

DIRECTOR TRAINOR: First of all, I am sorry Senator Ozinga is not here because I did check on the sixth-month problem. We did have a problem, but it is nowhere near as severe as Dr. Houghton and Mr. Jarvis attempted to paint it.

In the last eight months there have been ten records that took 45 days or more, so that I don't think that is a generic problem, although we have issued instructions to regional directors and the

[End of Exhibit.]

* * *

[Affidavit of Service omitted in printing.]

* * *

[Affidavit of Service omitted in printing.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing.]

DEFENDANTS' OBJECTIONS TO THE ENTRY OF PLAINTIFFS' PROPOSED ORDER

Plaintiffs herein have offered this Court a proposed order allegedly intended to implement the previous orders and opinions of this Court. This Court rendered its decision in Defendants' Motion to Dismiss on December 31, 1975. Defendants were given to and including January 21st to make their objections to that order.

Prior to the Court's decision Plaintiffs filed an appeal to the United States Court of Appeals for the Seventh Circuit seeking reversal of this Court's Order denying Plaintiff's Motion for an Entry of Final Judgment and Decree, which order was entered on the 1st of December, 1975. The appropriateness of an appeal from the denial of an entry of an order while at the same time urging its entry in the court below is a question of jurisdiction on which this Court should be briefed by the parties. However, due to the brevity of time that Defendant's Counsel has been afforded, that issue cannot be adequately briefed herein. Only the objections to the order will be set forth.

OBJECTION TO PROPOSED FINAL JUDGMENT

1. The proposed order totally ignores the fact that the Defendant ILLINOIS DEPARTMENT OF PUBLIC AID has ceased maintaining its § 406(e) Emergency Assistance program. In fact, Plaintiffs' proposed order sug-

gests that the program is continuing and in their proposed order seeks to mandate the resurrection of a program which has long since ceased.

This Court's Order of December 31, 1975 recognizes that, since November 24, 1975, the Illinois Department of Public Aid has not been operating a program pursuant to § 406(e) of the Social Security Act. Paragraph 14 of the proposed order evidences plaintiffs' erroneous contention that the Defendants must resurrect this program:

> "The State Defendants have violated *and continue to* violate § 406(e) of the Act. . . ."
>
> Paragraph 14 of Plaintiffs' Proposed Order
> (Emphasis added.)

This assertion is directly contrary to the finding of the Court of Appeals in the instant case that the Illinois Department of Public Aid has the right to discontinue, as it already has, its § 406(e) program at any time.

> "Illinois, *should it elect* to continue to provide an Emergency Assistance program in the future, will still have substantial control of its program. . . .
>
> Seventh Circuit Court of Appeals Decision
> (September 25th, 1975) at page 11.
> (Emphasis added.)

The Court of Appeals cited, at page 13 of its Decision, *Purnell* v. *Edelman*, ——F. 2d—— (7th Cir. Nos. 74-1051 and 1052, decided April 10th, 1974.). That case presented a problem to the Trial Court on remand identical to the instant situation. In *Purnell*, the Illinois Department of Public Aid chose to cease its participation in the same 406(e) Emergency Assistance program for utility service "turnons" and instead adopted a different mode of handling the problem which did not use § 406(e) funds. Plaintiffs, on remand to the Court below, sought a Rule to Show Cause why the Defendants should not be held in contempt of court. Upon being satisfied that the State was no longer claiming funds under the 406(e) Emergency Assistance program, plaintiffs withdrew their motion for a rule. In that case withdrawal from the 406(e) program was sufficient to moot the controversy. This Court should likewise recognize the Defendant's option to withdraw from the Federal Emergency Assistance program and should recognize that the IDPA, in fact, has chosen that alternative.

The conclusions of law proposed in paragraphs 9, 10, 11, 12, 13 and 14 are thus erroneous insofar as the State of Illinois has ceased participating in the 406(e) program.

2. The proposed order erroneously seeks to interfere with the Defendants' decision to operate special needs program for burnouts and other specified conditions.

The Plaintiffs' Complaint does not include any allegations regarding the IDPA's ability to maintain any specific programs under § 402 and § 403 of the Social Security Act. This Court has heard no argument on such points. Yet the Plaintiffs seek to have this Court determine relationships between these various Act sections (paragraph 11 of the Proposed Order) and declare violations of § 402 (paragraph No. 12 of the Proposed Order). Such "conclusions" are not only based upon matters not properly brought before this Court, but also are immaterial to the action.

The action was brought in relation to the IDPA's § 406(e) program. Such program does not now exist. To effect other actions, a new action (or at the least an amended complaint) would be necessary. Plaintiffs have chosen, and declared their intention, not to amend their Complaint.

3. The paragraphs in the "Ordered and Decreed" portion of the draft order are each unacceptable as they are based upon improper legal conclusions.

Paragraph A is based upon the assumption that a 406(e) program is still being maintained. This assumption is false and misleading.

Subparagraph 1, 2, 4 and 5 thereof seek to order the IDPA to create a new § 406(e) program. Such an order would be contrary to the Court of Appeals' clear statement the State may choose not to operate a 406(e) program.

Paragraph B of the proposed order seeks to order HEW to change its ruling and procedures on § 406(e). As there is currently no 406(e) program in Illinois, any consideration of such an order would be erroneous, as there exists no case or controversy, at least until IDPA should later decide to recreate a § 406(e) program, should it so choose.

Paragraphs C and D of the proposed order seek to mandate the granting of "emergency assistance" by IDPA. To the extent that this paragraph relates to a § 406(e) program, it is improper for the reasons stated above. If this paragraph is not based on § 406(e) but is based on an alleged state law requirement, it is inappropriate insofar as this Court declined pendent jurisdiction over state law questions.

Paragraph F of the Proposed Judgment Order seeks to bind Defendants' attorneys. Defendants' attorneys are Special Assistant Attorneys General, and as such are constitutional officers of the State of Illinois. Therefore, this portion of Paragraph F is completely inappropriate and must be stricken.

Defendants do not object to the entry of Paragraph G, and respectfully state that such an order, stating the Court's continuing jurisdiction, is the sole order necessary and proper to effectuate the Court's December 31st 1975 ruling in the present situation. Should the situation change, this Court may enter such orders in the future as are appropriate.

The Court of Appeals has ruled upon the IDPA's program as it existed prior to November 24, 1975. The Defendants have no intention of acting irresponsibly or in bad faith and will not reinstate a § 406(e) program prior to the next status call within prior notice to the Court.

This Court may wish to consider the entry of an Order, a portion of which declares that said Order is only binding upon state officials insofar as they claim funds under 42 USC § 406(e). However, it is the Defendants' contention that the Court need only maintain continuing jurisdiction of the matter at this time. Clearly, as long as the State of Illinois does not claim monies under this section of Title 42, any order which directs them to resurrect and maintain such a program is contrary to the law of this case.

Respectfully submitted,

/s/ WILLIAM J. SCOTT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing.]

FEDERAL DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINAL JUDGMENT

As a preliminary matter, the federal defendant objects to the entry of any further orders or decrees in this matter, other than an order dismissing this cause as moot. It is uncontested that the Illinois Department of Public Aid is no longer requesting reimbursement from the Department of Health, Education and Welfare for funds expended under Section 406(e) of the Act, 42 U.S.C. § 606(e). The matter is moot.

Objections to Proposed Findings and Conclusions

Besides the fact that this cause is moot and that the cause has not been remanded by the Court of Appeals for further action, the federal defendant's main objection to the plaintiffs' proposed final judgment is that it asks this Court to rule on issues that were never presented to it and on which it has heard no evidence. This point is obvious from a consideration of paragraphs 11 and 13 of the plaintiffs' proposed conclusions of law. Those paragraphs read:

> 11. Congress, in §§ 406(e) and 403(a)(5) of the Act, has determined the terms of eligibility and funding for an emergency assistance program. *The state defendants' effort to avoid the eligibility standards of § 406(e) by claiming funding for emergency assistance from funds available for AFDC or for any other federally funded program is contrary to the clear intent of the Act and a violation of § 406(e)(1).*
>
> * * *
>
> 13. *Defendant H.E.W., furthermore, may not approve or fund a state's emergency assistance program, whether designated as a "special need" or otherwise, except as authorized by § 406(e).* (Emphasis added.)

By insinuating these paragraphs into their proposed final order, plaintiffs are asking this Court to define the permissible scope of the Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. § 606(b), by ruling that certain types of aid are not included in that program. Such a ruling on the AFDC program is totally inappropriate for several reasons. The complaint, as amended, does not challenge the AFDC program. Additionally, the plaintiffs are asking this Court to rule on the validity of a program under AFDC that is not in existence and that has not even been submitted for approval to the Department of Health, Education and Welfare. Thus, there is no controversy before this Court concerning any new Illinois AFDC program; and there may never be. Yet, plaintiffs seek to have this Court enjoin the Department of Health, Education and Welfare's approval and funding of programs that have not been submitted for approval.

Objections to the Proposed Decree

The introductory part of paragraph A of the proposed decree suffers from the same deficiencies as the proposed conclusions of law. The question of whether a regular state AFDC program can provide assistance if, for example, a burnout occurs, has not been put in issue in the pleadings and no concrete factual situation has been presented to the Court.

The numbered subparagraphs of paragraph A seek to have this Court, in effect, order the State to adopt an emergency assistance program. There is no legal basis for requiring the State to adopt such a program.

Paragraph B of plaintiffs' proposed decree is also improper. In that paragraph, plaintiffs seek an injunction against possible, vaguely defined future action of the Department of Health, Education and Welfare. The use of the drastic remedy of permanent injunction is not necessary. This Court, if it enters an order other than an order for dismissal, will presumably declare the now defunct Illinois emergency assistance program to be invalid. If such an order is entered and becomes effective, the Department of Health, Education and Welfare will comply with it. Plaintiffs seek far more than compliance with the Court of Appeals determination that the Illinois emergency assistance program was invalid. Plaintiffs seek a purely advisory ruling and injunction that any state program under any section of the Social Security Act that provides what plaintiffs term "emergency assistance" is invalid.

In subparagraph 1 of paragraph B, plaintiffs seek to have this Court order the Secretary of the Department of Health, Education and Welfare to promulgate new regulations. This Court has no authority to order the performance of a discretionary act, such as the adoption of any particular regulation.

Conclusion

The federal defendant has applied to the Court of Appeals for the Seventh Circuit for an order recalling its mandate and vacating its prior order for mootness. If the Court of Appeals grants our petition, this Court need not act. If that petition is denied, the federal defendant is likely to petition for a writ of certiorari to have the Supreme Court declare this cause to be moot. We suggest that this Court withhold action pending ruling by the appellate tribunals.

Respectfully submitted,

/s/ SAMUEL K. SKINNER

SAMUEL K. SKINNER
United States Attorney

[Affidavit of service omitted in printing.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Thomas R. McMillen

July 12, 1976

73 C2453

Mandley v. Trainor

Defendant's motion to dismiss for mootness is granted, and this cause is dismissed for lack of case or controversy.

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing.]

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE THOMAS R. McMILLEN, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, July 12, 1976, at the hour of 10:00 o'clock a.m.

* * *

THE CLERK: 73 C 2543, MANDLEY vs. TRAINOR; status report.

MR. LEFKOW: May it please the Court, we are here today for a hearing that your Honor offered the plaintiffs on whether or not to amend the complaint. Your Honor will recall we were before you last Friday. We filed a memorandum of law. There was colloquy between the Court and counsel on certain various points.

I only have three basic points to make today, and part of them to respond to some inquiries your Honor made on Friday.

THE COURT: Let me say that I have got a number of shorter matters. I will pass this to the end of the 10:30 call.

> (Whereupon the Court gave its attention to other matters on its calendar, after which the following further proceedings were had herein:)

THE CLERK: 73 C 2453, MANDLEY vs. TRAINOR.

MR. LEFKOW: Good morning, your Honor. Michael Lefkow on behalf of the plaintiffs.

MR. GRUMLEY: George Grumley on behalf of the State defendants.

MR. FILPI: Robert Filpi for the Secretary of Education and Welfare.

THE COURT: Good morning.

MR. LEFKOW: Your Honor, when you called the case earlier, I started to say I had several brief comments I wanted to make.

The first was on the point of whether the complaint should be amended. It would be to offer to the Court a copy of our amended complaint we filed. I think early in 1973 –

THE COURT: I have it. You can have this back because I have the record here. I have looked at it.

MR. LEFKOW: Thank you.

THE COURT: That is the problem. I don't see how you raise these issues that you talk about in this last filing that you made the other day.

MR. LEFKOW: Well, your Honor, when the case was litigated, it was litigated on the whole complaint. You suggested on Friday it was litigated only on Section 406(e) but an examination of the complaint would reveal that many other sections are cited as being violated: Section 402, Section 403(a)(5).

For example –

THE COURT: Well, you cite them, yes. As a matter of fact, I was a little curious as to why you went on 406, but that is what it was litigated on and that is what it went to the Court of Appeals on.

Now the things that you raise are completely ancillary to the amended complaint that you filed on December 20, 1973.

MR. LEFKOW: Well, your Honor, I cannot really agree with that point, because we asked for a declaratory judgment; that the program the department was maintaining for emergency assistance violated both State and Federal law. We didn't limit it just to 406(e) and there was never any intent. I don't believe that a reading of the Court of Appeals would reflect it.

The second point is that Mr. Grumley said Friday they are claiming Federal funds or they could claim Federal funds as a special need apparently under the AFDC program. Mr. Grumley's statement is somewhat incoherent; it is difficult to tell just what he meant.

But that is in direct conflict with Mr. Filpi's statement on Tuesday of last week when he categorically denied that the Federal government was paying any funds for emergency assistance to the State defendants.

So, it is a question of what are the facts. We don't even know what the facts are before the Court. I don't know the facts, Mr. Grumley doesn't know the full facts.

MR. GRUMLEY: That is not true, your Honor.

MR. LEFKOW: Mr. Filpi doesn't know the full facts, and his statements are nothing but unsworn assertions of counsel.

I don't want to reargue the point on asking for Mr. Trainor's deposition, but if the Court is going to make a final disposition of this case, I think it ought to fully and fairly have all the facts before it, and not just statements of counsel.

THE COURT: Well, the only final disposition I was prepared to make, and I still am, is that the issue under 406 and the issue that was tried in this case and the issue that went to the Court of Appeals is no longer an issue. There is no longer any case or controversy on it.

Now you filed a document on July 6th in which you raised some ancillary matters in which you believe that the State is going around through the back door attempting to avoid the requirements of 406 and 402, and in various other ways trying to put in this program in a different way than was litigated, but that is not in your complaint.

What I have been saying all along, Mr. Lefkow, is if you want to raise those issues, plead them. Then if you want to take Mr. Trainor's deposition and find out if he is violating his duty by taking government money under false pretenses, we will go into that.

MR. LEFKOW: Well, your Honor, I believe that there is a presumption that everything is tried that is in the complaint, and nothing less than the full complaint is tried unless the Court expressly limits the issues at trial. There was no express limitation of this issue.

I wonder, your Honor, why we spent, why this Court spent three years and I as an attorney for the plaintiffs spent three years litigating an issue, and then they try to pull the rug out from underneath everybody and say we have a different program. Why didn't they say that first? Why did they hire one of the top law firms in the City of Chicago and State of Illinois and probably spent as much in fees as they were spending on emergency assistance? What have we been doing here for three years if they can do a maneuver like this? That is what I think it is, your Honor.

The Court can treat it as an equitable matter and say this is unconscionable. Your Honor said, I remember, in December, "I don't think what the defendants are doing is commendable, and I will rule on the merits."

THE COURT: On the merits of what?

MR. LEFKOW: That was on their motion to dismiss, and your Honor denied their motion to dismiss.

We pled in our answers to their motion to dismiss this fund-searching scheme.

Mr. Filpi took it up or other associates took it up to the Court of Appeals to try to get the Court of Appeals' decision vacated and get an order directing your Honor to dismiss the complaint. The Court of Appeals, your Honor, refused to do that.

Now, I think that that says the Court of Appeals is putting a stamp of validity upon this complaint. It did in its opinion and it did in its refusal to vacate its opinion.

THE COURT: You know as well as I do what the Court of Appeals said about Section 406, and that is exactly what happened. The State abandoned it.

MR. LEFKOW: Well, did they abandon it, your Honor?

THE COURT: Yes, they did.

MR. LEFKOW: Well, how do we know that? Mr. Grumley six months –

MR. GRUMLEY: I know what I said.

THE COURT: I don't know whether you know it or not, but I know it. That is why I say I was prepared to rule that the complaint is moot.

Now, if you want to file an amended complaint, if you want to accuse the State, which you have a right to do, doing this under some kind of fraudulent or dishonest or overt action in another program, in my opinion you should file an amended complaint. That is what I asked you to do today if you wanted to do it.

I don't think you have alleged it in your amended complaint that we tried. As far as I am concerned, that complaint is dead.

MR. LEFKOW: Well, your Honor, we alleged, I remember specifically, in Paragraph 42 that the Department of Health, Education and Welfare was funding a program for the State of Illinois for emergency assistance that violated Federal and State law, and we cited the law. It was not just limited to Section 406(e). I remember when I was before you on Monday, you said, "You only asked for relief under Section 406, didn't you, Mr. Lefkow?" I said, "No, your Honor."

I didn't say it in so many words. I said, "No, your Honor." Again, I say no, we didn't ask for relief under 406(e).

We asked for relief for violations of Federal and State law under the whole Social Security Act, whatever is applicable, which would be Sections 402, 403(a)(5) and 406(e).

So, I thought I answered your Honor's point on this. I don't see how we can have a much broader complaint in this case. It pleads a notice pleading. In a case like this, they know what they are doing and they know what type of subterfuge it is. They haven't denied that they are claiming Federal funds. It should be watched if they are claiming Federal funds.

Was your Honor able to find the specific paragraph?

THE COURT: Oh, yes. I read your amended complaint immediately after you said you thought that it covered this new situation that has developed in the last six months. I have it right here. I just don't think that the amended complaint covered it.

You cite a half dozen sections of the statute and a half dozen regulations, but that isn't what you litigated and you know you didn't litigate it.

MR. LEFKOW: Well, your Honor, I must disagree with that. I believe that everything that is in the complaint is litigated.

THE COURT: You litigated the program that was under Section 406.

MR. LEFKOW: Well, your Honor, 406 just defines what emergency assistance is.

THE COURT: That is right. You went under a definition section.

MR. LEFKOW: Yes, your Honor, but at the top of the definition section, it says "when used in this part" and the part it refers to, your Honor, is Section 402(a) of the Social Security Act.

Now, Section 402(a) commences with Section 401, which is an appropriation authorization and the public purposes.

Section 402 says that a State plan for aid and services to needy families with children must meet the following requirements, about 28 of them.

THE COURT: That is right.

MR. LEFKOW: So, now, what we have said in our complaint, your Honor, is that when they give emergency assistance out, and it is defined in the Federal regulation, it must be given out pursuant to plan under Section 402. That plan under 402(b) must be approved by the Secretary of the Department of Health, Education and Welfare.

Now, when the Secretary has approved that plan, then the Secretary of the Treasury may, pursuant to Section 403(a)(5), which is the appropriation statute, pay from the Treasury of the United States to the Illinois Department of Public Aid or the State of Illinois Federal funds for the purposes of emergency assistance. That, your Honor, is the statutory scheme, and that is what we alleged in the complaint, and we believe that that was what was tried by this Court and reviewed by the Court of Appeals.

We believe the Court of Appeals said if they are claiming Federal funds for emergency assistance purposes, they cannot maintain a discriminatory regime where they give emergency assistance to some needy families but they don't give it to other needy families.

Now, the situation as far as I know, your Honor, hasn't changed. Many needy families are still not receiving emergency assistance.

Mr. Grumley stated on Friday that they have a different program than the one that was litigated in this case. Your Honor, I haven't seen it. I have never seen a notice of filing that shows that they showed it to this Court. I think he should show it to this Court and he should show it to the plaintiffs and to HEW. I think we should get the full facts out here, Judge.

THE COURT: As I said before, Mr. Lefkow, if you want to file a complaint that goes into their present program, you are going to have to amend, or if you want to accuse them of some deviousness, taking money for emergency relief that they are not supposed to, you are going to have to amend.

Now, let's hear what Mr. Grumley has to say, because I asked you specifically if you wanted to file an amended complaint today, and I haven't heard any answer, but I haven't seen an amended complaint.

MR. GRUMLEY: Your Honor, briefly, I suggest that the Court reconsider the motion to dismiss for mootness that the State and Federal defendants made some months ago. In light of recent filings, I think it is appropriate as the Court noted to grant that motion now.

Secondly, in response to Mr. Lefkow, I am looking at the decision of the Court of Appeals, namely, on page 11 which notes briefly, and I am quoting, "Illinois, should it elect to continue to provide an emergency assistance program in the future, must have substantial control over that program."

That intends to me, and it did to my clients, that as the law provides, it is an elective program.

But further, all throughout the opinion of the Court of Appeals, it notes on page 1 and goes on that plaintiffs alleged department revised program for emergency assistance to AFDC recipients filed under Section 406(e) of the Social Security Act – on through every page of the complaint, that is the only statutory provision that the Court of Appeals referred to.

I think it is clear that we did litigate the program under Section 406, and that nothing else was before the Court other than that.

I have nothing further to say.

THE COURT: Well, it was my understanding of what was litigated.

Do you want to file an amended complaint and raise these other issues? I am perfectly willing to review whatever emergency aid program the State has if they are using Federal funds.

I am not going to review it on this complaint.

MR. LEFKOW: Your Honor, I believe that the status of the pleadings is sufficient for the Court to enter a final and just order enforcing the mandate of the Court of Appeals. We believe that the facts should be more fully brought out through Mr. Trainor's deposition. We outlined these matters, what they were doing, for the Court back in November. We pled them in our answer to their motions to dismiss which were denied by this Court and denied by the Court of Appeals.

We don't believe that we could plead the matters any further than we have pled them, your Honor, or try them any further, because we believe they have been fully tried, and that this Court should really put its foot down and stop what the defendants are doing to circumvent the Court of Appeals' decision and the decision of this Court.

We must respectfully decline the Court's invitation to amend the complaint. We do urge the Court to reconsider allowing us to take Mr. Trainor's deposition. Thereafter, after we have had a chance to do that, to enter the final order that we suggested to the Court back in November of 1975.

THE COURT: That is the final order with respect to the 406 program, isn't it?

MR. LEFKOW: No, your Honor. Our proposed and final order covers the program which is basically – it must be filed under 402, your Honor. It must meet all the eligibility requirements of Section 406(e).

THE COURT: I don't think I have that particular document here.

MR. GRUMLEY: It was filed several times, your Honor.

MR. LEFKOW: It was filed November 26, your Honor. In a way, your Honor, this is the same situation that was before the Supreme Court in the Townsend case which I mentioned previously.

THE COURT: Which one? Which case?

MR. LEFKOW: The Townsend case, your Honor.

THE COURT: Oh.

MR. LEFKOW: It involved interpretation of the definitional section, 606(a), as to children between 18 and 21 who were attending colleges or vocation schools and whether the State had to give money to children in college. At the time they were only giving it to children in vocation schools.

The United States Supreme Court interpreted the definitional section and said that that section requires the Department of Public Aid through Section 402(a)(10), which is the duty to furnish assistance with reasonable promptness – in this case, it is the duty to furnish assistance forthwith. Those two sections combined placed a mandatory duty upon the defendants to provide this assistance unless Congress had clearly indicated on the face of the statute or in the legislative history a contrary desire.

The Court of Appeals, of course, in this case said that Congress had not indicated on the statute or in the history a contrary desire other than there be no discrimination among these needy families, your Honor.

So, that same reasoning, your Honor, applies to the situation we have before us here.

We believe we are in accord and conformity with the approach the Supreme Court of the United States has taken to welfare litigation. We believe that the Court of Appeals also has adopted that same approach in this particular case. To amend the complaint further, we believe, could not accomplish anything. The children will still suffer in the meantime with the long delays, long expenses.

I must say to the Court that the litigation in this case has to me been a great personal burden. It has been a great burden to the plaintiffs to represent a class of needy children who have been deprived of effective emergency relief for a period of three years. The complaint as amended, if no relief is granted, it could go on, your Honor, for another several years. We believe that that heavy, heavy burden that rests upon us requires us to decline to amend the complaint.

THE COURT: Well, that is why it baffles me, Mr. Lefkow, that you would rather avoid what I think you should do and find yourself back up in the Court of Appeals with another two-year delay. I mean, it isn't going to expedite the matter at all for you to take the position you are, because as Mr. Grumley has said more than once, he would like to litigate this in the Court of Appeals. That does nothing except delay the ultimate relief that you and your clients apparently believe they are entitled to. It could be very simply remedied if you do what I have suggested to you several times. You have declined to do it.

So, I am going to dismiss the complaint on the grounds of mootness and the lack of any case or controversy between the parties. That will be the order.

MR. FILPI: Thank you, your Honor.

MR. GRUMLEY: Thank you very much, your Honor.

(Which were all the proceedings had and taken on the day and date aforesaid in the above-entitled cause.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1865

VENUS MANDLEY, et al.,

Plaintiffs-appellants,

v.

JAMES L. TRAINOR, et al.,

Defendants-appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 73 C 2453—**Thomas R. McMillen,** *Judge.*

HEARD NOVEMBER 4, 1976—DECIDED
NOVEMBER 23, 1976

Before CUMMINGS and TONE, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

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*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

Cummings, *Circuit Judge.* This appeal is a sequel to the proceedings discussed in our earlier opinion reported in 523 F. 2d 415 (1975) (*Mandley I*). There we held that the Illinois Emergency Assistance Program for needy families with children defined eligibility more narrowly than Section 406(e)(1) of the Social Security Act (42 U.S.C. § 606(e)(1) and therefore violated the Act. Our mandate was returned to the district court on October 24, 1975.[1] On November 26, the plaintiffs submitted a proposed final judgment and decree disposing of the controversy. A few days thereafter the state defendants filed a motion to dismiss the cause of action on the ground that on November 21, 1975, Illinois had withdrawn from participation in the Emergency Assistance Program established under Section 406(e). They did not inform the Court that they intended to carry on virtually the same program[2] under a different name but still with the usual 50 per cent federal funding as part of their regular Aid to Families with Dependent Children (AFDC) Program. The record shows that this new plan was to avoid our September 25 decision and was conceived as early as November 17, 1975, and formally presented to HEW on April 23, 1976, but effective January 1, 1976. However, on November 18, the state defendants misled the Court by asserting that only state funding would be employed.

HISTORY OF EMERGENCY ASSISTANCE AFTER *MANDLEY I*

In order to understand how the state defendants have vacillated between affected compliance with *Mandley I* and a final blatant disregard of the congressional eligibility requirements enforced thereby, it is necessary to trace the history of emergency assistance in Illinois after that decision became final.

At the November 17, 1975, meeting of the Illinois Legislative Advisory Committee on Public Aid, defendant Trainor submitted the recommendation dated October 30, 1975, of his Department to "Eliminate [42 U.S.C.] 606(e) Program and Create a Program for Meeting Emergent Burnout Cases to be Funded Under Section 602 and Section 603." After consideration of the Department's proposal, the Committee endorsed the Department's recommendations and requested that the Department report back to the Committee "at its April 1976 meeting with the results of this program and [its] recommendations to handle other special emergency needs which may not have been met."

In its October 30 position paper, the Department indicated that "[e]liminat[ion] [of] the 606(e) Emergency Assistance Program" was out of the question:

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[1] In December 1975, the Department of Health, Education and Welfare requested and received an extension of time in which to petition the Supreme Court for certiorari. However, no petition for certiorari was ever filed. In January 1976, the Department sought to have us recall our mandate on the ground of mootness but we denied its petition on January 30, 1976.

[2] In a letter dated March 9, 1976, from Director Trainor of the Illinois Department of Public Aid to the Legislative Advisory Committee on Public Aid, Trainor revealed:

> "the special needs program we substituted affords the virtually same benefits and employs the delivery system we were using prior to the Court's ruling that our program was not in accord with S406(e) of the Social Security Act. Thus, there has been no effect upon the recipients * * *."

> "The Department, although believing this [eliminating] alternative to be legally acceptable, finds this alternative totally unacceptable. The Department believes that certain Emergency conditions, such as homelessness through burn outs are needs which the Department of Public Aid clearly ought to meet and the Department would not wish to curtail its ability to do so."

"[O]fficial notification to the Department of Health, Education and Welfare that Illinois shall not request reimbursement pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e)) for any expenses incurred after November 21, 1975, as the Department is terminating its program for 'Emergency Assistance to Needy Families with Children' existing pursuant to said § 406(e)" was given by the Department of Public Aid in a November 21, 1975, letter to HEW.

On April 23, 1976, the state defendants submitted a plan to HEW (Joint Appendix 21-132—21-140) that was consistent with this notification of November 21. The April 23 plan, discussed *infra,* is the one now in effect.

On April 26, 1976, before another meeting of the Legislative Advisory Committee on Public Aid, Trainor indicated that the Department would assent to a broader emergency assistance program to alleviate destitution:

> "After July 1, 1976, the program would be on a six-month trial basis. It would broaden the emergency needs to include persons to whom destitution exists or to whom destitution is threatened, and remedy any cause of destitution" (Tr. at 40).

On May 3, 1976, in a report to the Court, defendants averred that the:

> "Department will in all probability choose to apply for funding pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e) *et seq.*), when it has completed designing such an emergency assistance program and will submit the necessary State plan amendments to the Department of Health, Education and Welfare."

In the same report, defendants stated they were not "presently claiming any funds under § 606(e)."

In a May 12 report to the Court, defendants submitted a proposed plan which laid out eligibility requirements at least colorably consistent with Section 406(e)(1). At a May 17, 1976, meeting of the Legislative Advisory Committee, Representative Mann indicated that the implementation date of the broadened plan would be advanced from July 1, 1976, to April 1, 1976.

On May 19, 1976, HEW filed its comments on the May 12 plan. Acknowledging that the new plan "differs radically from the old emergency assistance program," HEW noted:

> "It is the Secretary's understanding that the plan description is merely a report to the Court concerning the present state of the Director's thinking concerning a new Illinois emergency assistance program. *When and if, that thinking crystalizes and is embodied in a completed plan, that plan will be submitted to the Secretary for approval. Until that time, the Secretary can have no formal views on the acceptability of any plan that the Director may be considering.*" (Emphasis supplied.)

Because of the broadened eligibility requirements, the plaintiffs believed that the "objections to the earlier plan [they] intended to file on May 19, 1976 [might] be unnecessary either in whole or in part," although the plaintiffs reserved the right to file objections to the amended plan.

On June 14, the Legislative Advisory Committee approved a plan with the following eligibility requirements:

> "Recipients of AFDC, AABD, GA (in units administered by the Department) and persons who could be found presumptively eligible for such programs, including any needy child under 21 and the specified relatives with whom he is living. An additional condition of eligibility is that the persons must be destitute or immediately threatened with destitution."

This plan, by is own terms, sought reimbursement, at least in part, pursuant to Section 406(e).

On June 16, 1976, the plaintiffs were served with a June 15 notice of filing in the district court of the same liberalized Emergency Assistance Program, "which in part will employ § 406(e) emergency assistance funds," that the Legislative Advisory Committee had approved on June 14. Curiously, on June 17, 1976, counsel for the State informed the plaintiffs that he had been ordered not to file the new plan. The next day, the State filed a report of status which averred that the State would not "formulate or implement any Emergency Assistance Program which in part or in whole employs federal funds pursuant to Section 406(e) of the Social Security Act." Perhaps counsel for the State was inadvertently confirming the classic Shakespearean lesson on semantics: "What's in a name? That which we call a rose by any other name would smell as sweet." (*Romeo and Juliet,* Act I, Scene v.) At any rate, that June 15 plan was never filed in court.

The plan submitted to HEW on April 23, 1976 (Joint Appendix 21-132—21-140) was virtually the same plan as that declared illegal in *Mandley I*. Even in its brief here, Illinois lists only two minor changes in the plan submitted to HEW, neither of which has any relevancy to broadened eligibility requirements.[3] The liberal plan worked out between the April 26 and June 14 Legislative Advisory Committee hearings which HEW felt "radically different" from the pre-*Mandley I* plan has never been submitted to HEW as far as can be determined from the opaque record before us.

Rather the plan submitted to the regional office of HEW on April 23, 1976, was a program with eligibility requirements which were identical in all material particulars to the pre-*Mandley I* program. Thus on July 12, 1976, when the district judge declared the case moot the only change with respect to the Illinois Emergency Assistance Program funded by HEW was that the source of funding had been switched from Section 403(a)(5) to Section 403(a)(1). Most importantly for our purposes, the scope of the program's eligibility requirements was identical to that of the eligibility requirements declared illegal in the pre-*Mandley I* plan.

The end result is succinctly detailed in a June 1, 1976, colloquy between the district judge and plaintiffs' counsel:

> "The Court: But I don't think, as I get it, nobody is being deprived emergency assistance, although they may not get it under Section 606(a) [sic, 606(e)]
>
> "Mr. Lefkow: That is not correct, your Honor. Many, many people are being deprived of emergency assistance." (Tr. at 8)

DISMISSAL OF ACTION

On December 9, 1975, the defendant Secretary of Health, Education and Welfare filed a motion to dismiss on the ground of mootness. The state and federal motions to dismiss were answered by plaintiffs and denied by Judge McMillen on December 31, 1975, and he ordered the defendants to file objections to the plaintiffs' proposed final judgment and decree within three weeks. Such objections were filed by the state defendants on January 21, 1976, and by HEW on the following day but never ruled upon.[4] Instead, after plaintiffs declined to amend their complaint further, the district judge dismissed the cause for mootness and for lack of case or controversy on July 12, 1976. This appeal followed. We reverse.

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[3] See not 6 *infra*.

STRUCTURE OF SUBCHAPTER IV OF THE SOCIAL SECURITY ACT AS IT RELATES TO FUNDING OF AID PROGRAMS

In order to appreciate the funding of "emergency assistance" programs, it is necessary to outline briefly the structure of Subchapter IV funding. Section 401 authorizes the Congress to appropriate for each fiscal year a sum sufficient to carry out the general purposes of Part A of Subchapter IV—Aid to Families with Dependent Children. The sums so appropriated are made available to states which have submitted AFDC plans. Only states whose plans have been approved by the Secretary of Health, Education and Welfare may receive federal funds. The criteria for approval and the mechanics of approval are set forth in Section 402.

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[4] In order to force a district court decision so that they would then have a final order for purposes of appeal to this Court, plaintiffs asked us in March 1976 to mandamus the district court to decide whether or not to enter the plaintiffs' final judgment. We denied plaintiffs' petition for mandamus on March 31, 1976.

Once a state AFDC plan has been approved, Section 403(a) directs the Secretary of the Treasury to pay funds to the state from the funds appropriated under the authority of Section 401. Subsections (1)-(5) of Section 403(a) describe the various formulae used to calculate the actual dollar amounts to be paid. Since Section 403(a) actually directs the payment of funds, it is the section of Part A which should be referred to as the "funding" provision of Part A. Section 403(a)(5) provides that the Secretary of the Treasury shall pay 50 per cent of a state's expenditures for "emergency assistance" to needy families with children. It is the only part of Section 403(a) dealing with "emergency assistance."

THE DEFENDANTS' FRAMING OF THE MOOTNESS ISSUE

At the time of *Mandley I*, the state defendants were receiving emergency assistance funds under Section 403(a)(5). These funds were expended under the State's plan as "emergency assistance to needy families with children" as defined by Section 406(e)(1).

We are now advised that Illinois has ceased receiving funds pursuant to Section 403(a)(5) with the attached "strings" of Section 406(e)(1). Instead the State is receiving federal funds for emergency assistance under its regular AFDC plan pursuant to Section 403(a)(1). Since Section 403(a)(1) does not on its face include the term "emergency assistance to needy families with children," the State argues that the funds expended under Section 403(a)(1) no longer come with the attached "strings" of Section 406(e)(1). Defendants argue that the mandatory application of Section 406(e)(1) eligibility standards to the states announced in *Mandley I* occurs only if federal funding is received pursuant to Section 403(a)(5). Their argument concludes that since funding is now received only under Section 403(a)(1), the case is moot. Plaintiffs counter by alleging a circumvention of *Mandley I* by this change in funding.

SCOPE OF THE PRESENT CONTROVERSY

As a threshold matter, we must consider whether the plaintiffs' pleadings are broad enough to permit us to decide whether the defendants' change of funding is an artifice to avoid the *Mandley I* mandate. The amended complaint is an action brought to secure rights established by Section 406(e)(1) of the Social Security Act. Those are the rights that plaintiffs still seek to vindicate. The developments that took place after *Mandley* I were covered by the federal and state defendants' motions to dismiss, the plaintiffs' answer thereto, and the supporting documents filed by the respective parties. The very issue now before us was thus submitted and before the district court without the need of further amendments to the complaint.

This case is not moot, for the state defendants are still operating an emergency assistance program with matching federal funds, although under the guise of a "special assistance" program.[5] There is a live case or controversy because plaintiffs maintain that the state defendants must still comply with the standards of Section 406(e)(1) as long as federal funding is used for this program, while the state and federal defendants remain juxtaposed against plaintiffs.

WHETHER SECTION 406(e)(1) "STRINGS" ATTACH TO EMERGENCY ASSISTANCE REGARDLESS OF FUNDING.

The Effect of Section 1318. Before reaching the ultimate issue—whether Section 406(e)(1) "strings" attach to emergency assistance regardless of funding—we must verify whether the present funding actually occurs under Section 403(a)(1). This is because HEW has recently informed us that the federal funding is solely under 42 U.S.C. § 1318. Section 1318 provides in pertinent part:

> "In the case of any State which has in effect a plan approved under subchapter XIX of this chapter for any calendar quarter, the total of the payments to which such State is entitled for such quarter, and for each succeeding quarter in the same fiscal year (which for purposes of this section means the 4 calendar quarters ending with June 30), under paragraphs (1) and (2) of section * * * 603(a), * * * of this title shall, at the option of the State, be determined by application of the Federal medical assistance percentage (as defined in section 1396d of this title), instead of the percentages provided under * * * such section, to the expenditures under its State plans approved under * * * part A of subchapter IV of this chapter, which would be included in determining the amounts of the Federal payments to which such State is entitled under such section, but without regard to any maximum on the dollar amounts per recipient which may be counted under such section."

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[5] Since we answer the issue of mootness at this fundamental level, we need not pass on the plaintiffs' answer to the defendants' motions to dismiss on grounds of mootness wherein they allege that "defendants intend by a technical maneuver to suspend temporarily requesting funds under § 406(e), to persuade this [district] court to dismiss the case as moot based on that suspension, and once the case is dismissed to return to § 406(e) funding without any prohibitions, injunctive or otherwise, from this [district] court." (Plaintiff's Memorandum in Opposition to Motions to Dismiss, December 17, 1975, at 5).

This provision as it relates to Section 603(a) (Section 403(a) of the Social Security Act) was added in 1968 by the Social Security Amendments of 1967. 1 U.S. Code Cong. & Admin. News 1042 (1967). The 1965 provision it amended was itself put in the Social Security Act merely to:

> "permit any state which has in effect a plan approved under the new title XIX [Medicaid] to claim Federal participation in its expenditures under all of its Federal-State public assistance programs by application of the new formula contained in title XIX instead of using the varying formulas in the existing titles." 1 U.S. Code Cong. & Admin. News 2265 (1965).

Indeed Section 1318, by its own terms, acknowledges that the entitlement for funding payments is still provided under Section 603(a) (Section 403(a) of the Social Security Act). Thus the interaction between Section 603(a) and 1318 preserves the former's status as the funding provision with the effect of the latter here to maintain the same 50 per cent federal and 50 per cent state ratio of funding that exists for emergency assistance to needy children under Section 403(a)(5) of the Act. At any rate, even if the funding were now solely under Section 1318, HEW states that "does not materially change the argument of the appellee [HEW]" (Nov. 1, 1976, HEW motion to correct its brief). The state defendants have not mentioned Section 1318 orally or on brief, evidently also realizing it does not change their position. As with emergency assistance funding under Section 403(a)(5), Illinois receives a 50 per cent federal share for its AFDC program under Section 1318 alone or in combination with Section 403(a)(1).

The Ultimate Issue. The state defendants admit that they are conducting the same program under the label

"special assistance" that they formerly conducted under the label of emergency assistance, with minor exceptions.[6] Illinois contends that the service it formerly gave under Section 406(e)(1) as emergency assistance to needy families with children is now given under Section 402 as part of aid to needy families with children. Instead of seeking federal funding for the program under Section 403(a)(5) authorizing the Secretary of the Treasury to pay 50 per cent of the total amount expended by a state under its plan for emergency assistance to needy families with children, the state defendants assert that they now obtain federal funding under Section 403(a)(1) providing that the Secretary of the Treasury pay each state which has an approved AFDC plan certain amounts as computed thereunder. We hold that the Illinois defendants cannot avoid the eligibility requirements of Section 406(e)(1) by relabeling the plan as part of AFDC under Section 402 while still receiving 50 per cent federal funding for what is really Section 406(e)(1) emergency assistance to children.

Stripped to the bone, our holding is founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs under Part A of Subchapter IV. Section 406(e)(1), edited for present purposes, provides:

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[6] At HEW's suggestion, effective October 12, 1976, the state defendants removed the restriction limiting special assistance payments to once in any 12 consecutive months. Simultaneously, they no longer authorized the payment of moving costs as a result of court-ordered eviction. AFDC Manual, Release No. 76.46 (October 12, 1976), amending Manual Chapter 600.

> "The term 'emergency assistance to needy families with children' means any of the following [furnished during a defined time period to people meeting defined eligibility standards]—
>
> "(A) money payments, payments in kind, or such other payment as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and
>
> "(B) such services as may be specified by the Secretary;
>
> *but only with respect to a State whose State plan approved under Section 602 [Section 402 of Social Security Act]of this title includes provision for such [emergency] assistance.*" (Emphasis supplied.)

Clearly the State has the option of whether or not to include a provision in its state plan in order to receive federal funding under Section 403(a)(5) for Section 406(e)(1) emergency assistance. The legislative history of Section 406(e) reinforces this reading of the statute. As the Senate Finance Committee's report stated:

> "a new program optional with the States would authorize dollar-for-dollar Federal matching to provide temporary assistance to meet the great variety of situations faced by needy children in families with emergencies." 2 U.S. Code Cong. & Admin. News 2838 (1967).

But the fact that a State has the option of whether or not to claim federal funding under Section 403(a)(5) for Section 406(e)(1) emergency assistance is totally distinct from the question of whether a state has the option to choose whether to receive federal funding for emergency needs under Section 403(a)(5) or 403(a)(1). We conclude the state does not enjoy such an option.

HEW's principal argument is that Section 403(a)(5) merely provides an additional source of monies for state emergency assistance plans. The total amount of funds appropriated in a given year for AFDC by the Congress is allocated according to the applicable formula in Section 403(a)(1). In any given year, the Section 403(a)(1) formula would determine a fixed dollar amount. Thus to the extent that federal funding for a "special assistance" program is sought from the total amount of monies in a year allocated to fund Section 403(a)(1) AFDC programs, these other programs presumably would be reciprocally limited. Since Section 403(a)(5) draws on a different block of the funds appropriated for emergency assistance in any given year, a similar limiting tension would not exist on state emergency programs funded under Section 403(a)(5). In this sense, Section 403(a)(5) funding is "additional." But by underscoring these funding subtleties, HEW has shown why Section 403(a)(5) should be construed as the exclusive funding provision for emergency assistance. The 1967 amendments were introduced to correct the unsatisfactory delivery of state emergency assistance. Those amendments would be undermined if HEW's construction were permitted to create this limiting tension on Section 403(a)(1) AFDC funds while the Section 403(a)(5) block of funds appropriated by Congress for emergency assistance in a given fiscal year lies unused.

When Congress added the emergency aid for children provisions to the Social Security Act in 1967, Senator Curtis explained them on the floor of the Senate (113 Cong. Rec. 36319 (1967)):

> "Now, Mr. President, I should like to refer to another new provision in this measure. *For the first time, the Federal Government will match money for emergency assistance. This has not been in the law before.* For a

> period of 30 days, emergency assistance can be paid in cases where they cannot meet other qualifications. Many of the States have asked for this provision, and it is one that should be looked at by those who say they will reject this bill because it is not liberal. It would do many of the things for which States, welfare directors, and others have been asking for a long time." (Emphasis supplied.)

Speaking directly after the acceptance of the Conference Report by the Senate, Senator Mansfield indicated the 1967 amendments' scope as follows (113 Cong. Rec. 36925 (1967):

> "Families with emergency trouble will be able to receive emergency assistance in whatever form it is best for them at their time of need. Families which have been burned out, suffered personal tragedies and such will be able to get money, medical care, shelfer provided, food sent in, or whatever else is needed to deal with the crisis. The committees are to be commended for adding this provision, thus recognizing that emergencies which strike families cannot be dealt with by business-as-usual methods.
>
> "Sometimes emergencies which strike families reveal deep-seated problems which establish that the children are in danger of exploitation or abuse. Under the legislation, States are required to have, in advance, plans to deal with these situations. This means working closely with the courts and being prepared, when necessary, to find places for children removed from the home by the courts. For these children, previous provisions have been inadequate. Under the new legislation, the financing will be sufficient to assure that the child may be placed in a safe place with the Federal Government paying its share of the cost."

The tenor of these remarks shows the importance of the program and that participating states would have to provide a plan approved by HEW. Emergency assistance was meant to supplement normal AFDC payments. As the Senate Finance Committee reported:

> "The Committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are cut-off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today." (2 U.S. Code Cong. & Admin. News 3002 (1967).

The federal regulations require that "emergency assistance will be given forthwith" (45 C.F.R. Section 233.120(a)(5), but Congress provided in Section 406(e)(1) that emergency assistance should be furnished only once in any 12-month period. It is thus apparent that regular AFDC public assistance was administratively and congressionally distinguished from emergency assistance, which is a one-time grant to "avoid destitution" (Section 406(e)(1)). As we held in *Mandley I*, relying in part on additional legislative history, Congress intended the eligibility provisions of Section 406(e)(1) to be mandatory on states giving emergency assistance. 523 F. 2d at 420-423. To like effect, see *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3d Cir. 1976); Note, Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families with Children, 60 Corn. L. Rev. 879, 886-891 (1975) (hereinafter cited as Cornell Note). In our view, the synergistic sum of all these factors results in the conclusion that Congress intended Section 403(a)(5) to be the exclusive source of federal funding in Part A of Subchapter IV of the Social Security Act for the Section 406(e) emergency assistance needs of the citizens of the states.

Illinois cannot evade the Section 406(e)(1) eligibility requirements by relabeling its emergency assistance program as AFDC "special assistance" while still obtaining matching funds from the federal government. See *Youakim* v.

Miller, 425 U.S. 231.[7] If that were permissible by a mere change in nomenclature, the requirements of Section 406(e)(1) would be totally eviscerated.[8] Therefore, if Illinois continues to accept federal funds for its "special assistance" program, the guidelines established by Congress in Section 406(e)(1) must be met (*Williams* v. *Wohlgemuth*, *supra*, at 170 n. 37; *Lynch* v. *Philbrook*, —— F. Supp. ——, —— (D. Vt. 1976), and HEW must continue to provide half the funding under Section 403(a)(5), as it formerly did with respect to Illinois.

We may take note that state funds available for expenditure on welfare programs are tightly limited. The Senate Finance Committee's report shows that through emergency assistance Congress meant "[t]o encourage public welfare agencies to move promptly and with maximum effectiveness in [emergency situations]." 2 U.S. Code Cong. & Admin. News 3003 (1967). Congressman Mills noted in the

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[7] In discussing *Youakim*, HEW has recognized that for a foster care plan to be funded under Section 403(a)(1) or 1318, it must meet the inclusion requirements in Section 408 (Br. 11). Similarly here, even if an emergency assistance plan (by whatever name) is funded under Section 403(a)(1) or 1318, it must meet the eligibility requirements of Section 406(e)(1). In the words of another metaphor of the same genus, whatever Illinois presently dubs its emergency assistance plan, "a rose is a rose is a rose."

[8] The *amici curiae*, various private charities, state in their brief that if this were

> "successful, [Illinois] would make permanent the transfer of the burden of providing for most emergencies to the private social welfare organizations in violation of the basic principles of both federal and state welfare policy."

debates that with emergency assistance, the House believed "that encouraging the States to move quickly in family crises, supplying the family promptly with appropriate services, would in many cases preclude the necessity for the family having to go on [AFDC] assistance on a more or less permanent basis." 113 Cong. Rec. 23054 (1967). Funding with Section 406(e)(1) eligibility requirements for emergency assistance requires the states to meet the needs of a broader class of individuals. Cornell Note, *supra*, at 883, 884. The total state share, assuming maintenance of the present level of benefits,[9] for funding emergency needs when the federal matching share comes under Section 403(a)(5) would normally be larger than if the federal funding comes under AFDC Section 403(a)(1) (whether singly or in conjunction with Section 1318), a provision ostensibly free of the Section 406(e)(1) eligibility requirements. Congress would be thwarted in its aim to encourage the provision of emergency relief to those children whom it intended as targets if a state had the choice of claiming emergency assistance funds under Section 403 (a)(1) for AFDC without the "strings" of Section 406(e)(1).

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[9] Of course, the level of state benefits does not have to remain constant. As we said in *Mandley I:*

> "Because Illinois has accepted federal funds to operate an emergency assistance program, it is bound by the eligibility provisions of 42 U.S.C. § 606(e). This need not result in additional expense to the state but with existing appropriations should at least result in helping a broader number of persons, although more moderately than at present." 523 F. 2d at 423.

RELIEF

This case concerns emergency needs of people in dire straits. Yet over three years have passed since the filing of the complaint and over one year has gone by since the return of our mandate in *Mandley I.* Therefore, we now consider *sua sponte* the objections of the defendants to the merits of plaintiffs' proposed final judgment of November 26, 1975. Cf. *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 410-435.

The state defendants object principally on the grounds that Section "406(e) funding" is no longer utilized by Illinois. For the reasons stated above, we cannot sustain this line of objection.[10] Lest Illinois mistakenly understand

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[10] The state defendants also apparently maintain that *Purnell* v. *Edelman,* 511 F. 2d 1248 (7th Cir. 1974), is a form of *stare decisis* upon our decision here. In the words of defendants' objection:

> "That case presented a problem to the Trial Court on remand identical to the instant situation. In *Purnell,* the Illinois Department of Public Aid chose to cease its participation in the same 406(e) Emergency Assistance program of utility service 'turnons' and instead adopted a different mode of handling the problem which did not use § 406(e) funds. Plaintiffs, on remand to the Court below, sought a Rule to Show Cause why the Defendants should not be held in contempt of Court. Upon being satisfied that the state was no longer claiming funds under the 406(e) Emergency Assistance Program, *plaintiffs withdrew their motion for a rule.* In that case withdrawal from the 406(e) program was sufficient to moot the controversy." (Emphasis supplied.)

The answer to this objection is immediate. In *Purnell,* the plaintiffs withdrew their own motion on the propriety of

this opinion to strip it of control over the implementation of its emergency assistance program, we hereby reaffirm our observations in *Mandley I:*

> "Illinois, should it elect to continue to provide an emergency assistance program in the future, will still have substantial control of its program. It will be able to choose the level of benefits that it will provide and to set the standard of need. It may reasonably limit the amounts paid out in emergency assistance, *Dandridge* v. *Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, but it will not be able to declare ineligible those who come within the federal definition of eligibility in Section 606(e). This Court need not establish the exact meaning of the eligibility provisions of Section 606(e) because this case requires only that the validity of the specific Illinois program be determined. The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rule-making. Such rule-making should aid the states in preparing programs that are in accord with the eligibility criteria set by Congress." 523 F. 2d at 422-423.

Part of the proposed final judgment orders HEW to file a proposed regulation with the district court to conform to our opinion. HEW contends that a federal district court has "no authority to order the performance of a discretionary act, such as the adoption of any particular regulation."

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the State's funding of emergency assistance with federal funds not subject to Section 406(e) eligibility standards, thereby voluntarily mooting the case. But in *Mandley II* the plaintiffs, far from voluntarily mooting their own case, are vigorously pursuing an attack on the validity of the state's emergency assistance program.

But the duty of the Secretary to promulgate regulations implementing the provisions of the Social Security Act is a mandatory one. 42 U.S.C. § 1302. Implicit in HEW's objection is the notion that ordering the promulgation of regulations is an untoward invasion of the province of the Secretary. This contention has been persuasively answered by the Second Circuit. In ***Kingsbrook Jewish Medical Center* v. *Richardson***, 486 F. 2d 663 (2d Cir. 1973),[11] the court reversed

> "the order below and remand[ed] to the district court with instructions to grant Kingsbrook's motion for summary judgment, to the extent of directing the Secretary of Health, Education and Welfare to promulgate regulations consistent with the interpretation [42 U.S.C.] 1395x(v)(1) that we have announced." 486 F. 2d at 670.

In an explanatory footnote, the court observed that:

> "Where there are no material issues of fact in dispute, an appellate court reviewing the dismissal of a complaint can, upon reversal, also remand with directions to grant summary judgment on appellant's previously denied cross-motion. Under the circumstances present here 'we perceive no reason for not bringing this litigation to an end.' Stein v. Oshinsky, 348 F. 2d 999, 1002 (2d Cir. 1965); 6 J. Moore, Federal Practice ¶ 56.13 at 2251-52 (2d ed. 1972)."

Since the defendants did not object to the findings of fact in the plaintiffs' final judgment, we can perceive no reason not to bring the instant case "to an end."

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[11] Professor Davis has approvingly characterized this case as an instance of a court being "guided by [its] usual common sense." K. Davis, Administrative Law of the Seventies, § 23.09 at 545 (1976).

Paragraph B-1 of the proposed final judgment purports to order the Secretary to include some specific items in the regulation, *viz.* "definitions of such terms as 'necessary to avoid destitution' and 'lack of available resources' which are compatible with providing emergency assistance when a needy child is approaching destitution." While it would be salutary to include such definitions in the new regulation and while the Secretary might find it necessary as a matter of administrative practicality to include them, we will not order HEW specifically to include any items in its new regulation.[12] Of course, whatever regulations the Secretary issues must be consistent with today's opinion and ***Mandley I***.

We have considered the defendants' other objections to the proposed judgment and find them without merit. Because there has been no compliance with our previous mandate for more than a year, we direct the district court to enter plaintiffs' proposed judgment forthwith except with respect to the definitional aspect of Paragraph B-1. In addition, finding of fact 7 should be deleted as obsolete, and Paragraph A-1(c) must be modified in accord with note 12. A fresh mandate will issue and be returned to the district court this day.

Judgment reversed and remanded for further proceedings consistent herewith.

---

[12] Because of this change, Paragraph A-1(c) of the final judgment is modified to commence "Until HEW files regulations under Paragraph B-1 below,".

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

VENUS MANDLEY, et al.,

Plaintiffs,

v.

JAMES L. TRAINOR, etc., et al.,

Defendants.

No. 73 C 2453

FINAL JUDGMENT AND DECREE

This matter comes on for entry of a final judgment and decree pursuant to prior decisions of this court and pursuant to the mandate of the Court of Appeals reversing in part and affirming in part the orders of this court to and including this court's order of March 14, 1975. The court being fully advised finds and concludes as follows:

FINDINGS OF FACTS

1. Except as modified herein, the factual findings of this court's memorandum decisions of November 21, 1974, February 5, March 14, August 1, and October 24, 1975 are incorporated herein as part of this final judgment.

2. The class of plaintiffs is composed of all (1) Aid to Families with Dependent Children (AFDC) recipients, (2) applicants for AFDC and (3) other families with needy children, in Illinois who are eligible for emergency assistance within the eligibility standard of § 406(e) of the Social Security Act (the Act), 42 U.S.C. § 606(e), as set out in paragraph 9 (p. 5) below.

3. Plaintiff Frances Gallman and her family met the eligibility standard of § 406(e) at the time of their application in November, 1973, to defendant Illinois Department of Public Aid (IDPA) for emergency assistance.

4. Defendants IDPA and its directors Edelman and Trainor have denied and continue to deny emergency assistance to plaintiff Gallman and to members of the plaintiff class who meet the eligibility standard of § 406(e) but whose emergency need arises from circumstances other than those described in defendants' regulations, IDPA Categorical Assistance Manual Ch. 6500, since renumbered, as Ch. PO 610.5.

5. The state defendants have reported to this court the length of time taken to process requests for emergency assistance, these reports having been made pursuant to the court's order of March 14, 1975. There the court required defendants to speed up the processing of emergency assistance requests from the "not uncommon" 7-10 days found by the court in its order of November 21, 1973,

so that emergency assistance requests will normally be disposed of within 24 hours. These reports show and I find as follows:

a. For requests for emergency assistance granted during the two reporting periods, May 8-June 9, 1975 and August 1-27, 1975, the periods of time taken for processing requests up to the time a check was ready to be placed in the mail or for pick up was more than one day in 88.8% (103 of 116) of cases in Cook County and in 71.6% (68 of 95) of cases in downstate counties:

	Cook	%	Downstate	%
Same day or 1 day	13	11	27	28.4
2 - 3 days	22	18.6	26	27.4
4 - 6 days	40	33.9	21	22.1
7 - 10 days	16	13.6	13	13.7
11 - 15 days	17	14.4	7	7.4
16 - 25 days	7	5.9	1	1.1
26 or more days	1	.8	0	0
not ascertained	2	1.7	0	0
	118	99.9	95	100.1

b. For requests for emergency assistance granted during the two reporting periods (May 8-June 9 and Aug. 1-27, 1975) four methods of delivery of emergency assistance checks were used: mail, pick up by client at fiscal management office, disbursing order at local office and by "C.D." (unexplained), as follows:

	Cook	Downstate
Mail	60	74
Disbursing Order	16	0
Pick-up at Fisc. Mgmt.	42	9
C.D.	0	12
	118	95

c. The amount of time from the date a check was ready for delivery by mail until receipt by the client during the two reporting periods was as follows:

	Cook	Downstate
1 day	31	34
2 days	8	6
3 days	0	1
4 - 6 days	0	1
7 or more days	1	3
Not ascertained	20	29
	60	74

Therefore, of those known, checks were delivered one or two days after mailing in 97.5 percent of cases in Cook and 88.9 percent downstate.

d. The reports demonstrate and the court finds that great and excessive delays continue to exist in the processing of emergency assistance checks, so that only a small percentage of checks are processed within 24 hours and delivered to the client within one or two days thereafter.

6. Since the mandate of the Court of Appeals was returned to this court, the state defendants have reported that they plan imminently to withdraw from the emergency

assistance program authorized by section 406(e) of the Act and have further reported that they plan to provide the same limited emergency assistance available under their program which was challenged and found unlawful in this lawsuit. In so doing, defendants intend to claim federal funds for this emergency assistance program under §§ 402 and 403(a)(1) (regular AFDC funds) of the Act.

CONCLUSIONS OF LAW

8. As defined in paragraph 2 above, this is a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

9. The state defendants have violated and continue to violate § 406(e) of the Act in denying emergency assistance to plaintiff Frances Gallman and members of the class who are eligible for emergency assistance as defined in § 406(e), to wit: families with a needy child (i) under the age of 21, (ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home, (iii) where such child is without available resources, (iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and (v) where such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment.

10. Because defendants' emergency assistance program Categorical Assistance Manual Ch. 6500 (PO 610.5), limits eligibility more narrowly than § 406(e) permits, its enforcement and operation are unlawful.

11. Congress, in §§ 406(e) and 403(a)(5) of the Act has determined the terms of eligibility and funding for an emergency assistance program. The state defendants' effort to avoid the eligibility standards of § 406(e) by claiming funding for emergency assistance from funds available for AFDC or for any other federally funded program is contrary to the clear intent of the Act and a violation of § 406(e)(1).

12. Defendant United States Department of Health, Education and Welfare has violated §§ 406(e) and 402(b) of the Act, 42 U.S.C. §§ 606(e) and 602(b), and its own regulations, 45 C.F.R. § 233.10(a)(1)(ii)(A), in approving and funding Illinois' emergency assistance plan which denies such assistance to members of the plaintiff class made eligible by § 406(e).

13. Defendant H.E.W., furthermore, may not approve or fund a state's emergency assistance program, whether designated as a "special need" or otherwise, except as authorized by § 406(e).

14. The state defendants have violated and continue to violate § 406(e) of the Act and regulations promulgated thereunder, 45 C.F.R. § 233.120(a)(5), which require that emergency assistance be given forthwith, by causing, and failing to correct after this court's order of November 21, 1974, serious delays in providing emergency assistance to members of the plaintiff class.

It Is Therefore Ordered And Decreed, as follows:

A. Defendants the Illinois Department of Public Aid, Joel Edelman and James I. Trainor, their successors in office, agents, employees and assigns are enjoined, so long as Illinois receives federal funding under Title IV-A of the Social Security Act, from claiming reimbursement for emergency assistance (however designated) under any other section of the Act than §§ 406(e) and 403(a)(5) and are enjoined from using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of § 406(e), and are further enjoined from denying emergency assistance to plaintiff Frances Gallman and to any member of the plaintiff class with a needy child

(i) who is under the age of 21,

(ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home,

(iii) where such child is without available resources,

(iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and

(v) such destitution did not arise because such child or relative refused without good cause to accept employment or training for employment.

In furtherance of this injunction these defendants are specifically directed to do the following:

1. Within 7 days from entry of this order, defendants shall file with the court and with defendant HEW amendments to its AFDC Categorical Assistance Manual (and to forms and other necessary instructions to staff) consistent with the terms of this order. These amendments shall

(a) Set forth the availability of emergency assistance to families with a needy child in the terms set out in (i)-(v) above.

(b) Specify that non-AFDC eligible children are eligible for emergency assistance if they meet the eligibility standards of (i)-(v) above.

(c) Until HEW files regulations under ¶ B-1 below, establishes a definition of the terms "lack of available resources" and "necessary to avoid destitution" which are compatible with providing emergency assistance when a needy child is approaching destitution.

(d) Establish amounts of assistance, forms of payment and types of services to be provided.

(e) Set forth examples of common forms of destitution to be avoided by provision of emergency assistance, including, but not limited to imminent eviction, imminent termination of utilities, and lack of food, basic clothing and household furnishings.

(f) Set forth examples of common causes of such destitution, including but not limited to fire and other disaster causing homelessness or damage to personal possessions, eviction, theft, abandonment by a parent, delays in awaiting normal processing of AFDC applications, failure to receive AFDC assistance due to administrative error and failure to receive other forms of income.

2. Defendants' submission pursuant to paragraph A.1 (p. 8) herein shall not define eligibility more narrowly than § 406(e) of the Act and shall be equitable as required by 45 C.F.R. § 233.10(a)(1)(ii).

3. Defendants shall review within 30 days from entry of this order the IDPA hearing decision, No. 73-4155, of March 18, 1974 denying emergency assistance to plaintiff Frances Gallman in the circumstances alleged in this complaint, and shall enter a new decision in compliance with the Court of Appeals' decision and this order. Such decision shall be promptly filed with this court and defendants shall report all further action including payment made with respect to her administrative appeal.

4. In order to assist the parties and this court with further proceedings for compliance the state defendants shall, within 30 days of the entry of this order, commence

to register all requests by needy families with children for emergency aid, categorizing such requests by a) type of need, b) cause of need, c) department response and d) reasons for denial if denial of the request occurs, and shall submit to this court monthly until further order of court the information obtained from such registry.

5. Plaintiffs shall have 7 days after submission of the materials required in paragraph A.1-4 herein in which to file comments or objections.

B. Defendant U.S. Department of Health, Education and Welfare is hereby enjoined from approving state plans for emergency assistance which limit eligibility more narrowly than § 406(e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406(e) and 403(a)(5). In furtherance of this injunction, H.E.W. is specifically ordered as follows:

1. Within 60 days from entry of this order, it shall file with the court proposed regulations governing emergency assistance, which proposed regulations shall be in accord with the opinion of the Court of Appeals, with this order and with 45 C.F.R. § 233.10(a) (1)(ii)(A).

(a) Plaintiffs shall have 15 days after submission of the proposed regulations in which to comment.

(b) Upon approval by this court and completion of procedures required by law for promulgation of regulations, defendant H.E.W. shall publish the regulations in the Federal Register and Code of Federal Regulations.

2. Within 90 days after submission of Illinois' plan for emergency assistance pursuant to Paragraph A (pp. 7-9) above, H.E.W. shall notify the court and the parties of its action in approving or disapproving the amended plan in accordance with standards set by the Act, this order and the decision of the Court of Appeals.

C. Defendants Illinois Department of Public Aid, Joel Edelman and James L. Trainor, their successors in office, employees, agents and assigns are enjoined from failing to ensure that emergency assistance grants are given forthwith to members of the plaintiff class, and are specifically directed in furtherance of this injunction to modify their procedures to provide as follows:

1. Caseworkers and necessary supervisory and other staff shall give preference to requests for emergency assistance over all other work assignments. Within 24 hours of a request staff shall verify need, determine eligibility and follow all necessary procedures to secure issuance of the emergency assistance payment, whether by disbursing order or check. This time period may not be extended except—

(a) for the time attributable to delay caused by an applicant's failure to provide essential information within his or her understanding and immediate control, or

(b) by waiver signed by the applicant for emergency aid.

Delay based upon an applicant's fault in (a) above shall be clearly described in the applicant's case record maintained by the department. In a case of waiver, the original waiver shall be maintained in the case record and the applicant shall be furnished a copy.

2. An individual requesting emergency assistance shall be advised orally and in writing during the initial interview that if eligible he or she may receive a disbursing order at the local office that day or within 24 hours of the request or, if the client prefers, a check may be mailed from Springfield or Chicago to an address provided by the client.

3. An applicant for emergency assistance not yet regularly receiving AFDC, as well as an applicant for emergency assistance currently receiving AFDC, shall have his or her emergency assistance request acted upon within the time limits of paragraph 1 above.

4. Defendant Trainor shall amend the Department's Categorical Assistance Manual to incorporate paragraphs B 1, 2 and 3 above.

(a) A copy of the amendment shall be submitted to the court not later than 15 days from entry of this order. Plaintiffs may within 10 days thereafter file comments in response thereto.

(b) Defendants shall distribute the bulletin or amendment to casework staff within 10 working days after receipt of the court's approval of it.

(c) The amendment issued in compliance with this order shall be filed with the court and shall not be modified or in any way changed without obtaining leave of court beforehand.

5. For each month beginning with the first month following entry of this order and continuing thereafter until further order of the court, defendants shall report their compliance with this order in a form substantially similar to defendants' reports of June (undated) and September 18, 1975, with additional information showing the cause for any delay greater than 24 hours from the time of request until a disbursing order or check is ready for delivery.

D. Defendant Trainor is further ordered to give notice to class members by the following methods:

1. In the next regular mailing for AFDC warrants, defendants shall enclose a notice setting out in easily understandable language the changes in emergency assistance effected by this order.

2. Within 60 days of entry of this order, defendant shall cause to be prominently displayed in all public areas of each public aid office in Illinois a poster describing in easily understandable language the material terms of this order.

3. The notice described in paragraph 1 and the poster described in paragraph 2 shall describe the type of need and possible circumstances under which emergency assistance is available and the conditions of eligibility for the program.

E. This order and compliance with this order shall not be interpreted as altering or in any manner affecting other obligations defendants have with respect to providing prompt assistance to AFDC applicants and recipients and/or providing emergency assistance to AFDC applicants and recipients pursuant to other judgments rendered prior to the date of this order or pursuant to state law.

F. This judgment shall be binding on defendants, their officers, agents, attorneys, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

G. This court shall retain continuing jurisdiction over this cause for purposes of enforcement.

H. Plaintiffs are awarded their costs in this matter.

....

United States District Judge
Thomas R. McMillen,

Date: ....

Supreme Court, U. S.
FILED
MAR 21 1977
MICHAEL RODAK, JR., CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1159

ARTHUR F. QUERN, ET AL.,
Petitioners,

vs.

VENUS MANDLEY ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit in Case No. 76-1865 *(Mandley II)* can be found at 545 F. 2d 1062 (7th Cir. 1976).

QUESTIONS PRESENTED FOR REVIEW.

The respondents believe that the petitioners' Question 2 is not before the Court on this petition because it pertains exclusively to *Mandley I,* and the time for filing a petition for certiorari from that decision has long since past.

STATEMENT OF THE CASE.

The petitioners have not stated the facts of the case in a clear manner which will aid the Court in reviewing the case. The respondents refer the Court to the discussion of the facts in the opinion of the Court of Appeals in *Mandley II*.

Significantly, the petitioners do not dispute in any respect the facts as stated by the Court of Appeals in its decision. A review of that decision reveals that the petitioners, after the return of the mandate in the first appeal in this case, *Mandley* v. *Trainor*, 523 F. 2d 415 (7th Cir. 1975) *(Mandley I)*, misled the District Court and the parties by stating initially that they were not claiming or receiving federal funds, and later by refusing to state whether or not they were claiming or receiving any federal funds for an emergency assistance program. Nonetheless, the petitioners continued to administer the same program invalidated in *Mandley I;* they simply changed the name of the program to "special assistance." After eight months, the petitioners admitted in court that they had been claiming and receiving federal funds under 42 U. S. C. § 602, providing for reimbursement of payments made under the Aid to Families with Dependent Children (AFDC) program. The District Court, apparently believing that the change of the name of the program made the case moot, dismissed the case nearly a year after the return of the mandate in *Mandley I*.

The Court of Appeals in *Mandley II* held that the petitioners' actions amounted to a "blatant disregard of Congressional eligibility requirements," 545 F. 2d at 1064, and was, in effect, an evasion of the Court's mandate in *Mandley I*.

It should further be noted that Mr. Justice Stevens, on January 28, 1977, as the petitioners stated, stayed the mandate of the Court of Appeals until February 18, 1977. On February 18, 1977, the stay of mandate expired on its own terms, and a motion to extend the stay beyond that date was denied by Mr. Justice Stevens (Case No. A-619).

ARGUMENT.

The respondents believe that a detailed argument on the merits is unnecessary, and that the well-reasoned opinion of the Court of Appeals speaks for itself. A three judge panel of the Court ruled unanimously for the plaintiffs in a lengthy and sound opinion.

The ruling of the court below does not conflict with the decisions of other courts which have considered the issue. Three courts faced with similar issues have reached the same conclusion as the Court of Appeals, and *Mandley I* has been cited in other decisions. *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3rd Cir. 1976); *Lynch* v. *Philbrook*, ... F. Supp. .... (D. Vt. 1976); *Ingerson* v. *Sharp*, 423 F. Supp. 139 (D. Mass. 1976). Each court, after examination of the Act and the legislative history of § 606(e), concluded that there is no indication from any source that Congress intended the coverage of § 606(e) to be optional with the states. The petitioners' argument, were it to prevail, however, would do just that. If a state could avoid § 606(e) eligibility requirements by merely renaming its emergency program and claiming reimbursement from the federal government as a part of its AFDC program, § 606(e) would, as the Court of Appeals explained, be totally eviscerated.

These rulings follow the same approach employed in countless decisions of this Court involving public assistance funding under the Social Security Act, from *King* v. *Smith*, 392 U. S. 309 (1968) and *Townsend* v. *Swank*, 404 U. S. 282 (1971), to *Philbrook* v. *Glodgett*, 421 U. S. 707 (1975).

In addition, many of the arguments the petitioners make are directed exclusively to an attack on *Mandley I*. Argument II is limited to this point. Yet, the petitioners had an opportunity after *Mandley I* to file a petition for certiorari in this Court and chose not to do so. In an application for a stay of the mandate of *Mandley I* in the Court of Appeals, the petitioners stated that they intended to file such a petition, but none was ever filed. Instead of seeking review of *Mandley I*, the petitioners relabeled their program in an attempt to evade the mandate. The petitioners should now be precluded from arguing points directed to *Mandley I*.

The remaining part of the petitioners' argument appears to assert that the judgment order is "unadministerable" (Petition at page 9) and that it will cost too much money. Assuming *arguendo* that the judgment presents problems in administration for the petitioners, they should seek to modify the judgment elsewhere, marshalled by some evidence in support of their contentions, and not on petition for writ of certiorari. The petitioners have still not complied with the mandate of *Mandley II*, and there is pending in the District Court two motions for a rule to show cause why they should not be held in contempt of court. The petitioners have presented no evidence in these second remand proceedings substantiating their claim that the judgment is unadministerable. Their statement on page 14 that they have not claimed federal funds for their emergency assistance program since *Mandley II* is incorrect. They continue to operate the same program that was declared illegal in *Mandley I* and *II* and receive federal monies for the program.

The only specific claim in the petition that the judgment is unadministerable is that there is a requirement that emergency assistance be delivered to those found eligible within 24 hours. This assertion is not a correct statement of the provisions of the judgment. Paragraph C.1. provides (Petition at App. 34):

> Caseworkers and necessary supervisory and other staff shall give preference to requests for emergency assistance over all other work assignments. Within 24 hours of a request staff shall verify need, determine eligibility and follow all necessary procedures to secure issuance of the emergency assistance payment, whether by disbursing order or check. This time period may not be extended except—
>
> (a) for the time attributable to delay caused by an applicant's failure to provide essential information within his or her understanding and immediate control, or
>
> (b) by waiver signed by the applicant for emergency aid.
>
> Delay based upon an applicant's fault in (a) above shall be clearly described in the applicant's case record maintained by the department. In a case of waiver, the original waiver shall be maintained in the case record and the applicant shall be furnished a copy.

Thus, the 24 hour rule is not absolute and does not include the time for mailing.

This provision was based on the finding of the District Court after trial in 1974 that it took on the average from seven to ten days for emergency assistance to be delivered to those found eligible. The petitioners never objected to this provision when the proposed judgment was submitted in the District Court by the respondents. The petitioners filed objections to the proposed judgment order, but never raised any of the contentions they now assert.

CONCLUSION.

The respondents pray that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, et al.,

Petitioners,

vs.

VENUS MANDLEY, et al.,

Respondents.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health Education and Welfare,

Petitioner,

vs.

VENUS MANDLEY, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE PETITIONERS

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Handbook of Public Assistance Administration, Part IV, Section 3131(2) (1949) 19

Hearings on the Social Security Amendments of 1967, H.R. 12080, 90th Cong., 1st Sess., 717 (1967) 25

S. Rep. 744, 90th Cong., 1st Sess., U.S. Code Cong. & Adm. News, v. 2, 2838 (1967) 22, 32

S. Rep. 744, 90th Cong., 1st Sess., U.S. Code Cong. & Adm. News, v. 2, 3002-03 (1967) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, et al.,

Petitioners,

vs.

VENUS MANDLEY, et al.,

Respondents.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health Education and Welfare,

Petitioner,

vs.

VENUS MANDLEY, et al.,

Respondents.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals rendered November 23, 1976 (A. 119) is reported at 545 F. 2d 1062. The order of the district court entered November 29, 1976, at the express direction of the court of appeals (A. 142) is not reported. The opinion of the court of appeals rendered September 25, 1975 (A. 30) is reported at 523 F. 2d 415.

JURISDICTION

On February 13, 1977, state petitioners Arthur F. Quern, Director of the Illinois Department of Public Aid, and the Illinois Department of Public Aid, filed their petition for a writ of certiorari. The jurisdiction of the Supreme Court of the United States to review this cause is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

(See Supplement)

U.S. Const., Art. III, § 2;
U.S. Const., Amend. XIV, § 1;
42 U.S.C. § 601;
42 U.S.C. § 602(a)(10);
42 U.S.C. § 603(a)(1);
42 U.S.C. § 603(a)(5);
42 U.S.C. § 606(b);
42 U.S.C. § 606(e);
42 U.S.C. § 1302;
42 U.S.C. § 1318;
42 U.S.C. § 1396d;
45 C.F.R. § 233.20(a)(2)(v), (1976);
45 C.F.R. § 233.120(a), (1976);
33 Fed. Reg. 10229 (1968);
34 Fed. Reg. 393 (1969).

QUESTIONS PRESENTED

1. Whether the court of appeals erred by reversing the decision of the district court entered July 12, 1976, which dismissed the case as moot?

2. Whether the court of appeals erred by ruling that states electing to maintain an emergency assistance program under 42 U.S.C. § 606(e) must provide relief from all types of destitution and for all needy families with children?

3. Whether the order entered by the district court at the express direction of the court of appeals imposes burdens on the State of Illinois not intended by the Social Security Act?

STATEMENT OF THE CASE

Respondents are Illinois recipients of Aid To Families With Dependent Children (AFDC) and the Chicago and Illinois Welfare Rights Organizations (hereinafter referred to as plaintiffs). In September, 1973, plaintiffs filed a class action for declaratory judgment and injunctive relief against the Illinois Department of Public Aid and its director. (Defendants herein) (A. 13) Defendants joined the United States Department of Health Education and Welfare (HEW) as a party defendant.

Plaintiffs' action, brought pursuant to 42 U.S.C. § 1983, challenged the validity of the Illinois emergency assistance program, promulgated under § 406(e) of the Social Security Act [42 U.S.C. § 606(e)][1] The Illinois program, lim-

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[1] Section 406(e) provides:

> (e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment —

ited to AFDC-eligible persons, was designed to meet emergent need resulting from four possible crisis situations:

1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
2. A court-ordered eviction occurs for reasons other than the recipient's failure to pay rent.
3. The AFDC family is potentially homeless due to damage to a portion of the building.
4. The AFDC applicant, determined presumptively eligible for AFDC, is in emergent need of clothing and/or household furnishings and equipment. (Emergent food and rent can also be authorized by disbursing order at the time the applicant is determined presumptively eligible as provided in this paragraph. Any amount

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> (A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and
>
> (B) such services as may be specified by the Secretary;
>
> but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.
>
> (2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.
>
> 42 U.S.C. § 606(e)

> thus authorized may not exceed the amount calculated as the applicant's first month's payment, and will be deducted from the applicant's first month's payment.)

(A. 25) Count I of plaintiffs' amended complaint alleged, *inter alia,* that the Illinois emergency assistance program violated the Social Security Act because: 1) it failed to provide aid to avoid destitution caused by other types of emergencies, and 2) it failed to include persons who were ineligible for AFDC, yet otherwise eligible for emergency assistance. (A. 20-21) Count II alleged that the Illinois program violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. (A. 24)

After a bench trial, on November 21, 1974, the district court ruled that the Illinois program was consistent with § 406(e) of the Social Security Act and the equal protection clause, but that the state defendants' processing of emergency assistance requests was too slow. (Sol. Gen'l. Petition, App. E.) On March 14, 1975, the district court ordered the state defendants to implement a revised processing procedure. (Sol. Gen'l Petition, App. D.)

Plaintiffs appealed the orders to the United States Court of Appeals for the Seventh Circuit, and on September 25, 1975, the court of appeals entered its first decision in this case. (A. 30) (*Mandley* I) The court reversed the November 21, 1974 order, ruling that the Illinois emergency assistance program violated the Social Security Act because it defined eligibility more narrowly than was allowed under § 406(e). The court noted that participation in the § 406(e) program was optional, and the state of Illinois need not continue to provide emergency assistance. (A. 43) The seventh circuit affirmed the March 14, 1975 order respecting the processing of applications, and the case was remanded to the district court.

On December 1, 1975, the state defendants filed a motion to dismiss the case on the ground that the lawsuit was moot. (A. 59) The motion and attached exhibits recited that Illinois had terminated its participation in the § 406(e) program, and it would no longer seek funds under either § 406(e) or § 403(a)(5).[2] HEW filed a motion to dismiss, based on the same ground, shortly thereafter. (A. 65) Both motions were denied by the district court on December 31, 1975. (A. 5)

On June 18, 1976, the state defendants again informed the court that they would not implement an emergency assistance program which was funded under § 406(e) or § 403(a)(5). In its place, the state defendants created a "special assistance" program as part of the Illinois AFDC program, which would be funded pursuant to § 403(a)(1) of the Act [42 U.S.C. § 603(a)(1)]. The new program, approved by HEW in April, 1976, was designed to meet the special needs of AFDC-eligible families. It afforded virtually identical relief as was provided under the § 406(e) program, but its benefits were available to eligible individuals more often than with the § 406(e) program.

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[2] Section 403(a)(5) provides:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to section 1320b of this title) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958 —
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> * * *
>
> (5) in the case of any State, an amount equal to 50 per centum of the total amount expended under the State plan during such quarter as emergency assistance to needy families with children.
>
> 42 U.S.C. § 603(a)(5)

Plaintiffs maintained that the new program constituted an unlawful attempt to circumvent the eligibility requirements of § 406(e). The district court granted plaintiffs leave to amend their complaint to allege the illegality of the new program. However, plaintiffs chose to stand on their complaint, and on July 12, 1976, the court dismissed the case as moot. (A. 106)

Plaintiffs appealed that decision, and on November 23, 1976, the court of appeals rendered its second decision in this case. (A. 119) (*Mandley* II) The court reversed the district court's dismissal of the cause as moot, ruling that Illinois could not avoid the requirements of § 406(e) by creating a "special assistance" program as part of its AFDC plan and seeking federal funds through § 403(a)(1). (A. 131) The court reaffirmed its prior decision that § 406(e) delineated the mandatory eligibility requirements for the emergency assistance program. (A. 135) The court of appeals remanded the case to the district court with instructions to enter the proposed final judgment order submitted by plaintiffs. (A. 141)

On November 29, 1976, the proposed order (as slightly modified) was entered by the district court. In pertinent part, the state defendants were required to submit amended emergency assistance regulations which satisfied the requirements of § 406(e). (A. 148) Additionally, the order compelled the state defendants to provide emergency assistance to eligible individuals within twenty-four hours of the initial request for aid. (A. 151)

On February 22, 1977, the state defendants filed a Petition for Writ of Certiorari to review the court of appeals decision. This Honorable Court granted the petition on June 6, 1977.

SUMMARY OF ARGUMENT

I.

The court of appeals erred by reversing the decision of the district court entered on July 12, 1976 dismissing the case.

The district court, applying undisputed principles of federal decisional law, correctly ruled that the lawsuit had become moot and, therefore, no case or controversy was before the court.

Plaintiffs' amended complaint alleged that the Illinois emergency assistance program promulgated pursuant to § 406(e) of the Social Security Act [42 U.S.C. § 606(e)] violated the Act by failing to follow specified criteria. After plaintiffs' position was sustained by the court of appeals, the State of Illinois terminated the optional program. In its place, the state created a "special assistance" program as part of its basic AFDC plan established pursuant to § 406(b) of the Social Security Act [42 U.S.C. § 606(b)], which would be funded under § 403(a)(1) [42 U.S.C. § 603 (a)(1)]. Since the emergency assistance program challenged by plaintiffs had been abandoned, and since plaintiffs refused to amend their complaint to challenge the new program, a case or controversy no longer existed.

The court of appeals erroneously ruled that the "special assistance" program was an unlawful attempt to circumvent the eligibility requirements of § 406(e). The court failed to appreciate the state's option to provide for special needs under its basic AFDC program. A state has great latitude to determine the standard of need for AFDC purposes, and a state may include whatever items it wishes in formulating its standard. The inclusion of special need items to meet crisis situations is perfectly permissible, and such action has been implicitly approved by federal decisional law.

The Department of Health Education and Welfare, entrusted with the enforcement of the Social Security Act, has issued regulations allowing the inclusion of special need items in a state's AFDC standard. This HEW interpretation long antedates Congressional enactment of the emergency assistance program.

Although the state defendants are providing virtually the same benefits under the "special assistance" program as were offered under the § 406(e) plan, there are differences between the two programs. Under the § 406(e) program, a state, at its option, may cover families not eligible for AFDC. However, under the "special assistance" program, a state may offer benefits only to AFDC-eligible families. Under the § 406(e) program, emergency assistance may be provided for only thirty days out of every twelve month period. No such time limitation exists respecting the "special assistance" program. Finally, the § 406(e) plan is funded under § 403(a)(5), while the "special assistance program is funded under § 403(a)(1).

The court of appeals incorrectly analyzed the operation of § 403(a)(1). Contrary to the court's holding, the funding of the "special assistance" program through § 403 (a)(1) will not limit the availability of funds for other AFDC programs. Thus, the court's analysis dos not support its conclusion that federal reimbursement for special or emergency needs must be exclusively drawn through § 403(a)(5).

Illinois' decision to implement only a special assistance program for AFDC-eligible families frustrates neither the requirements of § 406(e) nor the will of Congress. First, the § 406(e) program is optional with the states. Second, Congress, in enacting the emergency assistance program, did not withdraw the states' ability to meet the special needs of AFDC-eligible families.

II.

The court of appeals erred by ruling that states wishing to participate in the § 406(e) emergency assistance program must provide relief from all types of destitution and for all needy families with children.

While § 406(e) is couched in broad language, that section does not impose mandatory eligibility requirements on participating states. Rather, § 406(e) merely establishes the outer limits of the emergency assistance program which a state, in its considered judgment, may constrict.

Defendants' posture in this case is consistent with the legislative history behind the emergency assistance program. That history reveals that Congress gave the states flexibility in the formulation of emergency assistance programs. No part of the legislative history indicates that mandatory eligibility requirements were intended by Congress.

Furthermore, the Department of Health, Education and Welfare recognizes that states may define the eligibility standards and the emergency needs which will be met. This stance was taken contemporaneously with Congressional enactment of the emergency assistance program and should be given great weight.

Defendants' position promotes the purpose behind the emergency assistance program. The court of decisions decision, however, requires a state to consider two unattractive alternatives. The decision may force the state to substantially reduce benefits to eligible families, thereby paying those families meaninglessly small amounts. On the other hand, a state may be forced to substantially increase its welfare budget. Thus, the court's decision may force many states to terminate participation in the emergency assistance program altogether. Given that situation, the legislative goal behind the § 406(e) program will certainly be frustrated. Defendants' position, which allows each state to provide a significant amount of assistance to members of a smaller eligible class than was suggested by the seventh circuit, represents a meaningful solution to some of the problems affecting the poor.

The court of appeals decision that § 406(e) imposes mandatory eligibility requirements rests on the notion that § 402(a)(10) requires participating states to provide emergency aid "to all eligible individuals". However, that section only pertains to the program for "aid to families with dependent children", and not to the emergency assistance program. The court's attempt to otherwise interpret that provision violates settled rules of statutory construction.

While the court of appeals defined § 406(e) as establishing eligibility requirements, the court was unable to specifically define those requirements. Its difficulty manifests the court's erroneous position regarding § 406(e).

III.

The order entered by the district court at the express direction of the court of appeals imposes burdens on the state of Illinois not intended by the Social Security Act.

The district court order in essence requires the state defendants to resurrect an emergency assistance program according to guidelines established on the face of § 406(e). However, participation in the § 406 emergency assistance program lies within the discretion of the state, and the state defendants should not be subject to contempt proceedings for the lawful exercise of Illinois' right to refrain from participating in the program.

The order requires the state defendants to provide emergency assistance within twenty four hours of an initial request. This stringent time requirement is nowhere contained in the Social Security Act and HEW regulations. The court's order ignores the reality that such speed is not always necessary or possible. More importantly, the order sacrifices adequate vertification in the name of speed in delivery. The timetable would lead to the improper expenditure of funds, thereby unnecessarily depleting the state's limited welfare budget.

ARGUMENT

I.

THE COURT OF APPEALS ERRED BY REVERSING THE DECISION OF THE DISTRICT COURT ENTERED ON JULY 12, 1976 WHICH DISMISSED THE CASE AS MOOT.

A.

The District Court Properly Dismissed The Lawsuit On The Ground That It Was Moot And, Therefore, Did Not Present A Case Or Controversy.

Pursuant to Article III, § 2 of the United States Constitution, the exercise of federal judicial power depends upon the existence of a case of controversy. *Powell* v. *McCormack*, 395 U.S. 486, 496 n. 7, 23 L. Ed. 2d 491, 502 (1969); *Preiser* v. *Newkirk*, 422 U.S. 395, 401, 45 L. Ed. 2d 272, 277 (1975). The rule is firmly established that a moot case does not present a case of controversy. *Powell* v. *McCormack*, 395 U.S. 486, 496 n. 7, 23 L. Ed. 2d 491, 502 (1969). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 497, 23 L. ed. 2d. 491, 502. Since an actual controversy must be present at all stages of the litigation, not merely at the time the complaint is filed, a federal court loses jurisdiction over a case which becomes moot. *Roe* v. *Wade*, 410 U.S. 113, 125, 35 L. Ed. 147, 161 (1973); *Allee* v. *Medrano*, 416 U.S. 802, 818 n. 12, 40 L. Ed. 2d 566, 582 (1974). Such a situation arose in the instant case.

Plaintiffs' amended complaint, filed December 20, 1973, alleged that the implementation of the Illinois emergency assistance program violated § 406(e) of the Social Security Act and the Fourteenth Amendment to the United States Constitution. (A. 13) The district court found that the Illinois program conformed in most respects with the federal law, but the court of appeals reversed that decision. (A. 30)

Subsequent to the court of appeals opinion, the state of Illinois opted out of the 406(e) emergency assistance program, and both the state and federal defendants moved to dismiss the case as moot. (A. 59, 65) Of course, the mere voluntary cessation of allegedly illegal activity will not render the case moot, thus divesting the court of jurisdiction to hear a matter. *Preiser* v. *Newkirk,* 422 U.S. 395, 402, 45 L. Ed. 2d 272, 278 (1975); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633, 97 L. Ed. 1303, 1309 (1953). However, the case will be moot if the defendant can demonstrate that there is "no reasonable expectation that the wrong will be repeated." *Id.* at 633, 97 L. Ed. 1303, 1309.

Attached to the state defendants' motion to dismiss was the affidavit of Barbara Sticher, stating that the Department of Public Aid would immediately cease all activities and requests for reimbursement under its § 406(e) emergency assistance program. (A. 61) Also attached was a letter from former Department director James Trainor to the regional director of HEW, reciting that the Department had terminated its emergency assistance program. (A. 63) In addition, the state defendants' report to the district court on June 18, 1976, again indicated that they would not implement any emergency assistance program which employed federal funds pursuant to § 406(e). Thus, the state defendants convincingly demonstrated that there was no reasonable likelihood that the allegedly illegal conduct would be repeated.

Plaintiffs could have amended their complaint to allege that the Illinois "special assistance" program violated federal statutory or constitutional law. See, e.g., *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 635, 97 L. Ed. 1303, 1310 (1953) Indeed, plaintiffs were given every opportunity to do so by the district court. (A. 109, 111) However, plaintiffs elected to stand on their complaint which only challenged the state's previously terminated § 406(e) emergency assistance plan. (A. 117) Given plaintiffs' election, the district court properly dismissed the lawsuit for lack of a case or controversy.

B.

The State Of Illinois May Operate A "Special Assistance" Program As Part Of Its AFDC Program Funded Under 42 U.S.C. § 603(a)(1) Which Stands Separate And Distinct From The 42 U.S.C. § 606(e) Emergency Assistance Program.

In reversing the district court decision, the court of appeals stated:

> This case is not moot, for the state defendants are still operating an emergency assistance program with matching federal funds, although under the guise of a "special assistance" program.

(footnote omitted, A. 128), and further that:

> Stripped to the bone, our holding is founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs under Part A of Subchapter IV.

(A. 131) Readily apparent is the court's failure to realize that Illinois could provide assistance to meet the special needs of AFDC—eligible families through the § 406(b)

AFDC program, as funded via § 403(a)(1) of the Act. It is respectfully submitted that the court's inability to appreciate this option available to the state defendants resulted in the court's erroneous decision.

The "special assistance" program was established as a component of the Illinois program for "aid to families with dependent children," as defined by § 406(b). [42 U.S.C. § 606(b)] "The AFDC program is based on a scheme of cooperative federalism." *King* v. *Smith*, 392 U.S. 309, 316, 20 L. Ed. 2d 1118, 1125 (1968) A participating state must provide aid to "all eligible individuals." 42 U.S.C. § 602(a)(10) Thus, it is well settled that a state may not deviate from mandatory eligibility standards established in the Social Security Act. *Townsend* v. *Swank*, 404 U.S. 282, 286, 30 L. Ed. 2d 448, 453 (1971).

However, the state does enjoy certain discretion in operating the program, for it may determine the level of payments made to eligible persons. *Rosado* v. *Wyman*, 397 U.S. 397, 408, 25 L. Ed. 2d 442, 453 (1970); *Dandridge* v. *Williams*, 397 U.S. 471, 478, 25 L. Ed. 2d 491, 498 (1970); *Jefferson* v. *Hackney*, 406 U.S. 535, 541, 32 L. Ed. 2d 285, 293 (1972). In order to compute the level of payments, a state must formulate its standard of need which is "the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea* v. *Vialpando*, 416 U.S. 251, 253, 40 L. Ed. 2d 120, 125 (1974) Section 402 of the Social Security Act, which establishes the minimum requirements for a state plan, does not include mandatory items for purposes of constructing a standard of need. "Thus, some States include in their 'standard of need' items that others do not take into account." *Rosado* v. *Wyman*, 397 U.S. 397, 408, 25 L. Ed. 2d 442, 453 (1970).

Section 402 does not prohibit a state from including items of special or emergency need in its standard. Regulations promulgated by HEW clearly allow the inclusion of special need items.[3] 42 C.F.R. § 233.20(a)(2)(v) (1976) provides:

> If the State agency includes special need items in its standard, (*a*) describe those that will be recognized, and the circumstances under which they will be included, and (*b*) provide that they will be considered in the need determination for all applicants and recipients requiring them.

This interpretation antedates by nearly two decades Congressional enactment of the § 406(e) emergency assistance program and supports Illinois' position that it may operate a "special assistance" program as part of its regular AFDC program. See, e.g., *Handbook of Public Assistance Administration*, Part IV, § 3131(2), (1949); *Handbook of Public Assistance Administration*, Part IV, § 3131(3), (1966). It is settled beyond dispute that the longstanding interpretation of a statute by the agency entrusted with its execution is entitled to great deference. *Udall* v. *Tallman*, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 625 (1965); *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 421, 37 L. Ed. 2d 688, 699 (1973).

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[3] The Solicitor General's petition for a writ of certiorari notes that forty five states presently include special need items in their AFDC plans. (p. 10) Among the items included are emergency needs arising from catastrophes, natural disasters, and emergency child care. States consistently have been reimbursed pursuant to 42 U.S.C. § 603(a)(1) for expenditures made on behalf of families with dependent children for these items. (pp. 4-5)

Federal decisional law has implicitly approved the operation of special assistance programs such as was promulgated by the state of Illinois. The state of New York implemented an AFDC program which included not only recurring need items, e.g., food and clothing, but also included certain special need items. In 1969, New York eliminated those special need items from its program. In *Rosado* v. *Wyman*, 397 U.S. 397, 415-16, 25 L. Ed. 2d 442, 457 (1970), the Supreme Court relying on 42 U.S.C. § 602 (a)(23), held that New York improperly eliminated those special items from its standard of need.

Similarly, approval of the "special assistance" program was implicitly granted in *Bourgeois* v. *Stevens*, 532 F. 2d 799 (1st Cir. 1976). In that case, the Massachusetts AFDC plan had included non-recurring need items to help AFDC recipients during certain emergency situations. 532 F. 2d 799, 801. When those need items were eliminated, plaintiffs brought suit contending that the plan violated 42 U.S.C. § 602(a)(23). The court of appeals affirmed the district court decision allowing Massachusetts to eliminate its special need items under the AFDC program.

In short, the Social Security Act, as interpreted by HEW and the federal courts, permits Illinois to meet the special or emergent needs of AFDC-eligible persons under the state's basic § 406(b) AFDC program. In this light, the state defendants have not attempted to illegally circumvent the court's decision in *Mandley* I. On the contrary, the state defendants have lawfully taken an optional course of action available well in advance of Congressional enactment of the emergency assistance program and the decision in *Mandley* I.

While the "special assistance" program provides virtually the same benefits as was provided by the § 406(e) emergency assistance program, there are crucial differences between the two programs which were not perceived by the court of appeals. The § 406(e) emergency assistance plan permits a state to cover, at its option, persons not eligible for AFDC. However, the "special assistance" program, designed as a component of the AFDC program, covers only those persons eligible for AFDC. Moreover, under the § 406(e) program, aid may be granted for a "period not in excess of 30 days in any 12-month period." 42 U.S.C. § 606(e). However, no such limitation exists respecting the "special assistance" program. In addition, federal reimbursement under the § 406(e) program is granted at a fifty percent rate as provided in § 403(a)(5). Under the "special assistance" program, however, reimbursement is provided under the more complicated formula established at § 403(a)(1).[4]

The court's holding that §403 (a) (5) constitutes the "exclusive provision for federal funding of emergency needs" (A. 131) rests on an erroneous analysis of the §403 funding provisions. The seventh circuit reasoned that if AFDC special assistance funds could be drawn through § 403(a)(1), then federal funding to pay other AFDC benefits "presumably would be reciprocally limited" while § 406(e) funding would remain unspent. (A. 133) The court concluded that any special assistance reimbursement must be channeled solely through § 403(a)(5) and, therefore, the § 406(e) emergency assistance program. (A. 133) The court's theory is based on the premise that the Social Security Act limits the total dollar amount which a state may obtain under its AFDC program. However a fair reading of 42 U.S.C. § 601 negates that premise:

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[4] States also participating in the Medicaid program may apply the Medicaid formula instead of the formula set forth in § 403(a)(1). See, 42 U.S.C. § 1318. The federal reimbursement rate under the Medicaid program "shall in no case be less than 50 per centum or more than 83 per centum." 42 U.S.C. § 1396d.

> . . . there is authorized to be appropriated for each fiscal year a *sum sufficient* to carry out the purposes of this part.

(emphasis added) Thus, the funding of Illinois' special assistance program through § 403(a)(1) simply does not create a "limiting tension" on other AFDC funds provided under § 403(a)(1). (A. 133) Without a doubt, the court's analysis fails to support its conclusion in this case.

The seventh circuit also stated that Illinois would eviscerate the § 406(e) emergency assistance program and frustrate Congressional intent behind the program if Illinois could obtain federal reimbursement through § 403(a)(1) for its "special assistance" program. (A. 136) However, since relevant legislative history reveals that participation in the emergency assistance program is optional, [see e.g., S. Rep. 744, 90th Cong. 1st Sess., U.S. Code Cong. & Adm. News, v. 2, 2838 (1967)] Illinois' decision to opt out of the § 406(e) program does not frustrate Congressional will or eviscerate the program. Moreover, nowhere does the legislative history indicate that Congress, in creating the emergency assistance program, intended to withdraw the states' option to provide for the special needs of AFDC-eligible families which existed previous to the enactment of the § 406(e) program. Again, the court's conclusion in this regard is unsupportable.

Because the enactment of the "special assistance" program by the state defendants was entirely consistent with the Social Security Act, it is respectfully submitted that the court of appeals failed to appreciate the legal basis for the program, and consequently, defendants' motions to dismiss. Accordingly, the decision of the court of appeals should be reversed.

II.

THE COURT OF APPEALS ERRED BY RULING THAT STATES ELECTING TO MAINTAIN AN EMERGENCY ASSISTANCE PROGRAM UNDER 42 U.S.C. § 606(e) MUST PROVIDE RELIEF FROM ALL TYPES OF DESTITUTION AND FOR ALL NEEDY FAMILIES WITH CHILDREN.

In its November 23, 1976 ruling, the court of appeals reaffirmed its original decision that § 406(e) of the Social Security Act imposes eligibility standards which must be followed by participating states. (A. 135) In addition, the court instructed the district court to enter an order enjoining defendants from "using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of § 406(e)." (A. 150) It is respectfully submitted that the court's interpretation of § 406(e) and, therefore, its decision in this regard is erroneous.

Section 406(e) of the Act provides:

> (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one

> or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—
>
> > (A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and
> >
> > (B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.
>
> (2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

Even a cursory reading of § 406(e) reveals the great breadth of that provision, which embodies Congress' intention to create an emergency program which could reach beyond the bounds of the § 406(b) AFDC program. However, contrary to the seventh circuit's conclusion, § 406(e) does not require participating states to meet all emergency needs of all needy families with children in order to participate. Rather, § 406(e) merely defines the parameters of an emergency assistance program — boundaries which can be limited in the considered judgment of a state.

A state has great latitude in defining the standard of need within its boundaries. *Dandridge* v. *Williams,* 397 U.S. 471, 478, 25 L. Ed. 2d 491, 498 (1970); *Jefferson* v. *Hackney,* 406 U.S. 535, 541, 32 L. Ed. 2d 285, 293 (1972). It is free to determine which items will be included in the standard of need. *Rosado* v. *Wyman,* 397 U.S. 397, 408, 25 L. Ed. 2d 441, 453 (1970). Similarly, a state which participates in the § 406(e) emergency assistance program is free to determine the circumstances under which it will operate the program. As with the closely related yet separate AFDC program, not all impoverished persons may be covered, and not all exigent needs may be satisfied. However, such a circumstance does not invalidate a state's attempt to establish a limited emergency assistance program.

While legislative history is certainly less than abundant, it is consistent with defendants' position. The history shows that Congress intended to create a flexible program in order to encourage states to provide emergency assistance to the fullest extent possible. See, e.g., *Hearings on the Social Security Amendments of 1967*, H.R. 12080, 90th Cong. 1st Sess., 717, 1306; S. Rep. 744, 90th Cong. 1st Sess., U.S. Code Cong. & Adm. News, v. 2, 3002-03. Although the seventh circuit cited a number of passages of legislative history in support of its decision, none of that history indicates that Congress intended § 406(e) to impose mandatory guidelines on participating states.

Furthermore, defendants' position which would permit a state to structure the limits of its emergency assistance program has been consistently supported by H.E.W. 45 C.F.R. § 233.120 provides:

> (a) *Requirements for State plans.* A State plan under Title IV, Part A, of the Social Security Act, providing for emergency assistance to needy families with children must:

> (1) *Specify the eligibility conditions imposed for the receipt of emergency assistance.* These conditions may be more liberal than those applicable to other parts of the plan. (See paragraph (b)(1) of this section for scope of Federal financial participation.)
>
> (2) Specify if migrant workers with families will be included and, if emergency assistance will not be available to them Statewide, the part or parts of the State in which it will be provided.
>
> (3) *Specify the emergency needs that will be met,* whether mass feeding or clothing distribution are included, and the methods of providing payments, medical care, and other remedial care.
>
> (4) Specify which of the following services will be provided: Information, referral, counseling, securing family shelter, child care, legal services, and any other services that meet needs attributable to the emergency or unusual crisis situations.
>
> (5) Provide that emergency assistance will be given forthwith.

(Emphasis added) The Secretary of HEW issued regulations shortly after the effective date of § 406(e) allowing states to specify the conditions of eligibility for emergency assistance. [33 Fed. Reg. 10229 (July 17, 1968)] The regulation was made permanent on January 10, 1969. (34 Fed. Reg. 393) It is clearly established that the consistent statutory interpretation issued by the agency charged with the enforcement of a statute is entitled to great weight. *Udall* v. *Talman*, 380 U.S. 1, 16, 13 L. Ed. 616, 625 (1965); *Department of Social Services* v. *Dublino*, 413 U.S. 405, 421, 37 L. Ed. 688, 699 (1973).

The propriety of an HEW regulation giving latitude to states in the operation of AFDC program was recently upheld by this Honorable Court in *Batterton* v. *Francis*, —— U.S. ——, —— L. Ed. 2d —— (1977) (45 L.W. 4768, June 21, 1977). Pursuant to the AFDC-UF program, [42 U.S.C. § 607(a)], the Secretary of HEW was authorized to define "unemployment" for purposes of the program. The Secretary's definition gave states latitude to exclude from the meaning of "unemployment" those persons out of work due to a labor dispute or for reasons which would disqualify them for state unemployment compensation. A Maryland district court invalidated the regulation because it delegated the question of eligibility to the states. 45 L.W. 4768, 4769-70. On direct appeal, this Court reversed the lower court determination, stating:

> Certainly, the congressional purpose was to promote greater uniformity in the applicability of the AFDC-UF program. But the goal of greater uniformity can be met without imposing identical standards on each State.

45 L.W. 4768, 4772.

Pursuant to statutory authority [42 U.S.C. § 1302), the Secretary has promulgated regulations which allow a participating state to determine under which circumstances emergent needs will be met. While HEW's regulation may result in a lack of uniformity between states, it is nonetheless consistent with the Social Security Act and should be given effect here.

Additionally, the *Batterton* decision raised a significant consideration which is equally applicable here:

> Our conclusion is reinforced by our understanding of the AFDC-UF program as involving the concept of cooperative federalism. The States are free not to participate in the program, and, as we have noted, only about half of them in fact do so. The congressional purpose is not served at all in those States where AFDC-UF is totally unavailable. Accordingly, we

> should not lightly infer a congressional intention to preclude the Secretary from recognizing legitimate local policies in determining eligibility. See *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413-414, 421-422 (1973). [45 L.W. 4768, 4772.]

Illinois taxpayers cannot shoulder the burden of unlimited aid for the emergency assistance program. Of course, the state could provide aid to all needy children for a whole range of emergent needs. With the limited resources available, however, funds necessarily would be spread so thin that no one would be helped, with consequent loss to all members of the public. Instead, Illinois chose to provide funds only for certain emergency situations, thereby giving those eligible persons substantially more assistance than would be possible under a broader program. By doing so, the state exercised a legitimate legislative interest which the seventh circuit should have respected. As was stated in *Department of Social Services* v. *Dublino*, 413 U.S. 405, 413, 37 L. Ed. 2d 688, 694-95, dealing with a New York social welfare law:

> To the extent that the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution.

The court of appeals decision places the states in a real dilemma. Under the opinion, a state participating in the emergency assistance program must substantially increase the size of its welfare budget or else drastically reduce the level of benefits to provide aid for a greatly increased class of "eligible" individuals. The choice is, in essence, no choice at all, and the court's decision may force many states to opt out of the emergency assistance program altogether. The Solicitor General has previously indicated that besides Illinois, Wisconsin has abandoned its emergency assistance program due to decisions of the Seventh Circuit and other courts, and Arkansas has suspended its program because of "severe financial difficulties."[5] In light of these ominous facts, this Court's statement in *Batterton* takes on even greater significance:

> The States are free not to participate in the program, and, as we have noted, only about half of them in fact do so. The congressional purpose is not served at all in those States where AFDC–UF is totally unavailable.

45 LW 4768, 4772. The seventh circuit's decision, in determining that § 406(e) imposes mandatory eligibility standards, clearly frustrates the Congressional purpose behind the emergency assistance program.

The court of appeals based its conclusion in large measure on § 402(a)(10) of the Act, which provides that a state plan must:

> . . . provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. [42 U.S.C. § 602(a)(10)]

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[5] Petition for a writ of certiorari, p. 17.

However, the very terms of that section negate its applicability here, for § 402(a)(10) deals exclusively with the program for "aid to families with dependent children." Nonetheless, the court inferred that since the emergency assistance program is closely related to the § 406(b) AFDC program, § 402(a)(10) extends to the emergency assistance program.[6] The court's reasoning is particularly puzzling in light of the rest of its opinion. In another portion, the court found that when Congress gave the states the option to cover migratory workers, such intent was specifically stated. However, notwithstanding Congressional silence, the court merely inferred that Congress intended § 402(a)(10) to apply to the emergency assistance program. The court's reasoning constitutes a clear departure from the settled rules governing the interpretation of the Social Security Act. *Burns* v. *Alcala*, 420 U.S. 575, 580, 43 L. Ed. 2d 469, 475 (1975).

The court's error is further manifested in its inability to fashion a workable opinion. The court stated in *Mandley* I:

> . . . This Court need not not establish the exact meaning of the eligibility provisions of Section 606(e) because this case requires only that the validity of the specific Illinois program be determined. The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rulemaking.

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[6] While agreeing with the result reached by the court of appeals, the third circuit found that § 402(a)(10) is inapplicable to the emergency assistance program. *Williams* v. *Wohlgemuth*, 540 F. 2d 163, 168-69 (3d Cir. 1976).

(A. 43) Notwithstanding the court's resort to other sections of the Social Security Act, legislative history and decisional law, it was clearly unable to set forth the meaning of the § 406(e) "eligibility requirements." The court's obvious difficulties in this regard gives even greater weight to defendants' position that § 406(e) does not establish eligibility requirements at all. The seventh circuit's contrary conclusion, therefore, should be reversed.

III.

THE ORDER ENTERED BY THE DISTRICT COURT AT THE EXPRESS DIRECTION OF THE COURT OF APPEALS IMPOSES BURDENS ON THE STATE OF ILLINOIS NOT INTENDED BY THE SOCIAL SECURITY ACT.

As part of its decision, the court of appeals, *sua sponte*, considered the scope of relief to be granted plaintiffs. The court ordered the district court to enter plaintiffs' previously proposed final order,[7] which places burdens on Illinois that are clearly not intended by the Social Security Act.

The district court order requires the state defendants to promulgate amendments which set forth the availability of emergency assistance according to the terms of § 406(e). (A. 147-48) Essentially, the order compels Illinois to resurrect and reformulate its previously abandoned emergency assistance program. In no uncertain terms, the legislative history demonstrates that states need not participate in the emergency assistance program:

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[7] The order was slightly modified by the seventh circuit (A. 141).

> . . . a new program *optional with the States* would authorize dollar-for-dollar Federal matching to provide temporary assistance to meet the great variety of situations faced by needy children in families with emergencies.

(Emphasis added) S. Rep. No. 744, 90th Cong. 1st Sess., U.S. Code Cong. and Adm. News v. 2, 2838. The court's order subjects state officials to contempt proceedings merely because Illinois refused to participate in an optional program.[8] As appropriately stated in *Rizzo* v. *Goode*, 423 U.S. 212, 378-79, 46 L. Ed. 2d 561, 574 (1976) the judiciary should avoid disruption of a state's " 'latitude in the dispatch of its own internal affairs'."

Furthermore, should Illinois elect to participate in the § 406(e) program, it will be saddled with an unduly restrictive burden which could severely curtail its ability to properly administer the program. Under the court's order, defendants must provide assistance within twenty-four hours of the initial request. (A. 151.) However, such speed is not always possible or required, even in emergency situations. For instance, if utilities will be terminated in one week if past due bills are not paid, it is unnecessary to provide emergency assistance within twenty-four hours. Furthermore, the court-imposed deadline makes adequate verification of emergency assistance requests difficult if not impossible in many instances.

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[8] The order is specially disturbing given the pains taken by the court of appeals to assure Illinois that its participation in the emergency assistance program is not required. (A. 139).

It should be noted that the time period may be extended:

> (a) for the time attributable to delay caused by an applicant's failure to provide essential information within his or her understanding and immediate control, or
>
> (b) by waiver signed by the applicant for emergency aid.

(A. 151). However, the first exception is limited to situations where delay is caused by the applicant. Not covered are situations in which essential information, while not within the immediate possession or control of the applicant, is difficult to ascertain and verify. The second exception provides little assistance to defendants for applicants will rarely, if ever, sign such a waiver, especially in light of the court's broad grant of relief.

The time requirement imposed on defendants was based on 45 C.F.R. § 233.120(a)(5), which provides that emergency assistance shall be provided "forthwith". Significantly, a specific time limitation was not set out because HEW recognized that while speed is important, the system must be flexible enough to meet the state's need for adequate verification. Similarly, in *Adens* v. *Sailor*, 312 F. Supp. 923 (N.D. Pa. 1970), the court refused to impose a emergency assistance program.

The state defendants certainly recognize that an emergency assistance program should operate at an accelerated pace. However, enforcement of the rigid timetable imposed by the court would force the state to provide aid to meet inadequately verified needs, thereby further draining Illinois' limited welfare budget.

CONCLUSION

For the foregoing reasons, Arthur F. Quern, Director of the Illinois Department of Public Aid, et al., state petitioners, respectfully urge this Honorable Court to reverse the order entered by the court of appeals on November 23, 1976, affirm the order entered by the district court dismissing the cause as moot.

Respectfully submitted,

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U.S. Const., Art. III, § 2 provides in pertinent part:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., Amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 601:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and pro-

tection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(a), 70 Stat. 848; July 25, 1962, Pub. L. 87–543, Title I, § 104(a)(4), (c)(2), 76 Stat. 185, 186; Jan. 2, 1968, Pub. L. 90–248, Title II, § 241(b)(1), 81 Stat. 916.

42 U.S.C. § 602 provides in pertinent part:

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary.

(a) A State plan for aid and services to needy families with children must:

* * *

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;

42 U.S.C. § 603 provides in pertinent part:

§ 603. Payment to States; computation of amounts; Federal share of assistance payments; social and supportive services; appropriation; family planning services and supplies; reduction of amounts.

(a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to section 1320b of this title) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958 —

(1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)—

(A) five-sixths of such expenditures, not counting so much of any expenditure with respect to any month as exceeds the product of $18 multiplied by the total number of recipients of aid to families with dependent children for such month (which total number, for purposes of this subsection, means (i) the number of individuals with respect to whom such aid in the form of money payments is paid for such month, plus (ii) the number of other individuals with respect to whom expenditures were made in such month as aid to families with dependent children in the form of medical or any other type of remedial care, plus (iii) the number of individuals, not counted under clause (i) or (ii), with respect to whom payments described in section 606(b)(2) of this title are made in such month and included as expenditures for purposes of this paragraph or paragraph (2)); plus

(B) the Federal percentage of the amount by which such expenditures exceed the maximum which may be counted under clause (A), not counting so much of any expenditure with respect to any month as exceeds (i) the product of $32 multiplied by the total of recipients of aid to families with dependent children (other than such aid in the form of foster care) for such month, plus (ii) the product of $100 multiplied by the total number of recipients of aid to families with dependent children in the form of foster care for such month; and

* * *

(5) in the case of any State, an amount equal to 50 per centum of the total amount expended under the State plan during such quarter as emergency assistance to needy families with children.

42 U.S.C. § 606 provides in pertinent part:

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1)

money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other invidual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

* * *

(e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary;

but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

Aug. 14, 1935, c. 531, Title IV, § 406, 49 Stat. 629; Aug. 10, 1939, c. 666, Title IV, § 403, 53 Stat. 1380; Aug. 28, 1950, c. 809, Title III, Pt. 2, § 323(a), 64 Stat. 551; Aug. 1, 1956, c. 836, Title III, §§ 321, 322, 351(b), 70 Stat. 850, 855; July 25, 1962, Pub. L. 87-543, Title I, §§ 104(a)(3)(D), 108(a), 109, 152, 156(b), 76 Stat. 185, 189, 190, 206, 207; Oct. 13, 1964, Pub. L. 88-641, § 2(a), 78 Stat. 1042; July 30, 1965, Pub. L. 89-97, Title IV, § 409, 79 Stat. 422; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(f), 206(b), 207(a), 241(b)(5), 81 Stat. 880, 893, 916.

42 U.S.C. § 1302:

§ 1302. Rules and regulations

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

Aug. 14, 1935, c. 531, Title XI, § 1102, 49 Stat. 647; 1946 Reorg. Plan No. 2, §§ 1, 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1949 Reorg. Plan No. II, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; 1950

Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271; Aug. 28, 1950, c. 809, Title IV, § 403(c), 64 Stat. 559; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631.

42 U.S.C. § 1318:

§ 1318. Alternative Federal payment with respect to public assistance expenditures.

In the case of any State which has in effect a plan approved under subchapter XIX of this chapter for any calendar quarter, the total of the payments to which such State is entitled for such quarter, and for each succeeding quarter in the same fiscal year (which for purposes of this section means the 4 calendar quarters ending with September 30), under paragraphs (1) and (2) of sections 303(a), 603(a), 1203(a), 1353(a), and 1383(a) of this title shall, at the option of the State, be determined by application of the Federal medical assistance percentage (as defined in section 1396d of this title), instead of the percentages provided under each such section, to the expenditures under its State plans approved under subchapters I, X, XIV, and XVI of this chapter, and part A of subchapter IV of this chapter, which would be included in determining the amounts of the Federal payments to which such State is entitled under such sections, but without regard to any maximum on the dollar amounts per recipient which may be counted under such sections.

As amended Apr. 21, 1976, Pub. L. 94–273, § 2(23), 90 Stat. 376.

42 U.S.C. § 1396d provides in pertinent part:

Federal medical assistance percentage; State percentage; Indian health care percentage

(b) The term "Federal medical assistance percentage" for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum, and (2) the Federal medical assistance percentage for Puerto Rico, the Virgin Islands, and Guam shall be 50 per centum. The Federal medical assistance percentage for any State shall be determined and promulgated in accordance with the provisions of subparagraph (B) of section 1301(a)(8) of this title. Notwithstanding the first sentence of this section, the Federal medical assistance percentage shall be 100 per centum with respect to amounts expended as medical assistance for services which are received through an Indian Health Service facility whether operated by the Indian Health Service or by an Indian tribe or tribal organization (as defined in section 1603 of Title 25).

45 C.F.R. § 233.20(a)(2)(v):

§ 233.20 Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * *

(2) Standards of assistance.

* * *

(v) If the State agency includes special need items in its standard, (a) describe those that will be recognized, and the circumstances under which they will be included, and (b) provide that they will be considered in the need determination for all applicants and recipients requiring them.

45 C.F.R. § 233.120(a):

§ 233.120 Emergency assistance to needy families with children.

(a) *Requirements for State plans.* A State plan under Title IV, Part A, of the Social Security Act, providing for emergency assistance to needy families with children must:

(1) Specify the eligibility conditions imposed for the receipt of emergency assistance. These conditions may be more liberal than those applicable to other parts of the plan. (See paragraph (b)(1) of this section for scope of Federal financial participation.)

(2) Specify if migrant workers with families will be included and, if emergency assistance will not be available to them Statewide, the part or parts of the State in which it will be provided.

(3) Specify the emergency needs that will be met, whether mass feeding or clothing distribution are included, and the methods of providing payments, medical care, and other remedial care.

(4) Specify which of the following services will be provided: Information, referral, counseling, securing family shelter, child care, legal services, and any other services that meet needs attributable to the emergency or unusual crisis situations.

(5) Provide that emergency assistance will be given forthwith.

F.R. Doc. 68-8497 (33 Fed. Reg. 10229) provides in pertinent part:

[Interim Policy Statement No. 3]

EMERGENCY ASSISTANCE PROGRAM–AFDC

Notice of Interim Policies and Requirements

* * *

Subject. Emergency Assistance to Needy Families With Children.

Purpose. To implement sections 403(a)(5) and 406(e) of the Social Security Act.

Regulations A. *Requirements for state plans.* A State plan under title IV, part A, providing for emergency assistance to needy families with children must:

(1) Specify the eligibility conditions imposed for the receipt of emergency assistance. These conditions may be more liberal than those applicable to other parts of the plan. (See B(1) below for scope of Federal financial participation.)

(2) Specify if migrant workers with families will be included and, if emergency assistance will not be available to them statewide, the part or parts of the State in which it will be provided.

(3) Specify the emergency needs that will be met, whether mass feeding or clothing distribution are included, and the methods of providing payments, medical care, and other remedial care.

(4) Specify which of the following services will be provided: information, referral, counseling, securing family shelter, child care, legal services, and any other services that meet needs attributable to the emergency or unusual crisis situations.

(5) Provide that emergency assistance will be given forthwith.

F.R. Doc. 69-334 (34 Fed. Reg. 393) provides in pertinent part:

PART 233 — COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS.

Emergency Assistance To Needy Families
With Children

Interim Policy Statement No. 3 setting forth the regulations for the program administered under Title IV - Part A of the Social Security Act, with respect to emeregncy assistance to needy families with children, was published in the Federal Register of July 17, 1968 (33 F.R. 10229). No objections having been received from any person, such regulations are hereby codified by adding a new § 233.120 to Part 233 of Chapter II of Title 45 of the Code of Federal Regulations as set forth below.

§ 233.120 Emergency assistance to needy families with children.

(a) *Requirements for State plans.* A State plan under Title IV, Part A, of the Social Security Act, providing for emergency assistance to needy families with children must:

(1) Specify the eligibility conditions imposed for the receipt of emergency assistance. These conditions may be more liberal than those applicable to other parts of the plan. (See paragraph (b)(1) of this section for scope of Federal financial participation.)

(2) Specify if migrant workers with families will be included and, if emergency assistance will not be available to them Statewide, the part or parts of the State in which it will be provided.

(3) Specify the emergency needs that will be met, whether mass feeding or clothing distribution are included, and the methods of providing payments, medical care, and other remedial care.

(4) Specify which of the following services will be provided: Information, referral, counseling, securing family shelter, child care, legal services, and any other services that meet needs attributable to the emergency or unusual crisis situations.

(5) Provide that emergency assistance will be given forthwith.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, DIRECTOR OF THE ILLINOIS
DEPARTMENT OF PUBLIC AID, ET AL.,
Petitioners,
vs.
VENUS MANDLEY, ET AL.,
Respondents.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION, AND WELFARE,
Petitioner,
vs.
VENUS MANDLEY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS

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IN THE

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OCTOBER TERM, 1977

Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, DIRECTOR OF THE ILLINOIS
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vs.
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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

The following question is presented to this Court for review and is not among those described in petitioners' briefs:

> If petitioners prevail on questions 1 and 2, whether the final judgment approved and ordered entered in *Mandley II* can

be upheld on the basis of the Equal Protection Clause and State law claims pressed below but not reached on appeal.

STATUTES AND REGULATIONS INVOLVED

The following regulations and Illinois statute are set out as appendices to this brief: 45 C. F. R. § 233.10(a)(1)(i) and (ii); HEW Handbook of Public Assistance Administration, Part IV, §§ 3434.2, 5233 and 5520; Illinois Public Aid Code, § 12-8, Ill. Rev. Stat. ch. 23, § 12-8.

STATEMENT

Nature of the Case

On October 1, 1973 the Illinois petitioners, the Illinois Department of Public Aid (IDPA) and its director, predecessor to petitioner-defendant Quern, administratively restricted eligibility under the State's federally funded program of emergency assistance to needy families with children (emergency assistance program) authorized by §§ 402, 403(a)(5) and 406(e) of the Social Security Act (the Act). 42 U. S. C. §§ 602, 603(a)(5) and 606(e). In addition, petitioners imposed lengthy delays in delivery of this assistance to those eligible. These acts, and their approval by the federal petitioner, the U. S. Department of Health, Education and Welfare (HEW), were challenged in the United States District Court for the Northern District of Illinois by respondents, several impoverished families representing a class[1] excluded from benefits by these administrative changes and two organizations, the Illinois and the Chicago Welfare Rights organizations, whose participants are class members. Their civil

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[1] Petitioners' statements, Fed. br. 4; Il. br. 4, that respondents are Illinois recipients of aid to families with dependent children (AFDC) are only partially correct. The respondent class also includes all applicants for AFDC and other families with needy children. App. 15, par. 9; App. 143, par. 2.

rights complaint was twice upheld by the United States Court of Appeals for the Seventh Circuit, and relief restoring their federal rights has been granted although not yet enforced by the district court.

In March, 1971 Illinois submitted to HEW its first emergency assistance plan basing eligibility upon need as follows:

> § 6510 Emergency Assistance Provisions:
>
> *Active AFDC Only*
>
> (a) Paying delinquent rent or property payments allowed in lieu of rent to prevent eviction;
>
> (b) Paying delinquent utilities bills to restore discontinued service; and
>
> (c) Meeting immediate, emergent needs for other items of basic need included in the Standards of Assistance.

Limited moving costs were added later. Under that plan, assistance was provided after verification through disbursing orders (vendor payments) at the IDPA county/district offices. Needy families not eligible for AFDC were excluded unless their needs resulted from civil disorders. R. 1, A-2; Pl. Ex. 1, 67, 67b.[2]

On October 1, 1973 the Department severely constricted IDPA eligibility for emergency assistance.[3] In contrast to the

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[2] Three sets of references to the record are used. References to the record filed in the court of appeals in *Mandley I* are preceded by "R", the record filed on Mar. 21, 1975 (*Mandley I*), by R. I, and that filed in *Mandley II*, by R. II. Exhibits are identified as "Pl. Ex."/"D. Ex." Depositions are referred to as "Dep." and interrogatory answers are "Int." Transcripts of trial are "Tr."

[3] HEW had provided Illinois federal funds for approximately three years without approving the plan. HEW officials did not contend that the scope of the 1971 plan was too liberal, although they did suggest that Illinois should be more specific in the listing of the emergencies it did compensate. Tr. at 332-38, Dep. of Jesse B. Harris, admitted into evidence as marked, 17-28. Under this plan in 1972, the petitioners paid out $1,665,481.37. From January through September, 1973 the IDPA paid $1,929,469.53. Int.

(Footnote continued on next page.)

prior program, the revised program, App. 25, limited assistance as follows:

> An "emergent need" exists when one of the following crisis situations occurs:
>
> 1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
> 2. A court-ordered eviction occurs for reasons other than the recipient's failure to pay rent.
> 3. The AFDC family is homeless (without shelter) due to damage to a portion of the building.
> 4. The AFDC applicant, determined presumptively eligible for AFDC, is in emergent need of clothing and/or household furnishings and equipment.[4]

The Pleadings

Respondents' complaint, basing jurisdiction on 42 U. S. C. § 1983 and 28 U. S. C. § 1343, sought to enforce the provisions of §§ 401 *et seq.* of the Act, 42 U. S. C. §§ 601 *et seq.*, the Fourteenth Amendment, and the Illinois Public Aid Code, Ill. Rev. Stat. ch. 23, § 12-8. It requested declaratory judgment and injunctive relief restraining the Illinois petitioners from

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(Footnote continued from preceding page.)

24-26. R. 65. After the October 1, 1973 restrictions, payments fell to approximately $90,000 for the last quarter of 1973. Int. 25-26. R. 65. Illinois paid out $251,000 during the first six months of 1974. R. 131, Pl. Ex. 73.

[4] At the hearing on respondents' motion for a preliminary injunction, the district court ordered the Illinois petitioners to add the following clause to paragraph 4:

> (Emergent food and rent can also be authorized by disbursing order at the time the applicant is determined presumptively eligible as provided in this paragraph. Any amount thus authorized may not exceed the amount calculated as the applicant's first month's payment, and will be deducted from the applicant's first month's payment.) App. 25-29.

This provision was deleted in March, 1976 without notice to the court or respondents. See IDPA Categorical Assistance Manual, § PO 610.5 (current).

denying emergency assistance to needy families eligible under the Act and the Public Aid Code and from imposing excessive delays in the delivery of this assistance. R. 1. The Illinois petitioners moved to join HEW as a defendant, R. 11, and the district court directed respondents to amend the complaint to accomplish the joinder. R. 27, App. 14-29.

HEW answered that Illinois' revised plan was "being reviewed." R. 51. Illinois' amended answer, R. 32, asserted HEW had approved this plan. Neither answer asserted that Illinois might claim or that HEW might grant reimbursement of funds expended as emergency assistance under any provision of Title IV-A of the Act other than §§ 406(e) and 403(a)(5).

The Evidence

Respondent Frances Gallman, the mother of six children who received AFDC from the State petitioners, was attacked, beaten and robbed of $550 by four assailants on the afternoon of November 23, 1973 just after alighting from a bus in Chicago. Lacking any other resources her family was destitute, but the IDPA denied emergency assistance because of the restrictions in the revised plan.[5] Mrs. Gallman's IDPA caseworker referred her to a number of private organizations for help, including the Salvation Army and Red Cross. She received a small amount of food from these sources. Tr. 160-67.

---

[5] Without emergency assistance the family's suffering grew in severity and complexity. When robbed, Mrs. Gallman was carrying the money to a landlord of an apartment she intended to rent. Mrs. Gallman was under pressure to move from her cousin's apartment, where she and her children were staying, after the landlord threatened eviction because too many people occupied the apartment. The amount stolen, which she had saved from previous public assistance checks, covered two month's rent and a security deposit. After the robbery, Mrs. Gallman was left with $30 until December 10 when she received her monthly check for December for $389. R. 103, § 1-6 par. 43.

When she received her December check, Mrs. Gallman rented an unfurnished apartment paying the landlord $140 for December's rent and $70 as a partial security deposit. She used her remaining funds for a deposit on a refrigerator and stove, food for her family, and blankets. For six weeks she and her children slept on the floor. Lacking a stove or refrigerator, the family ate out of cans heated on the radiator or ate fruit, cold cuts, cereal and other foods that did not have to be cooked or refrigerated. The family was without winter clothing since such items remained in storage in New York,

(Footnote continued on next page.)

The evidence adduced at trial demonstrated that many emergencies suffered by the class were not relieved by the IDPA, including evictions for non-payment of rent, destitution caused by theft and vandalism, utility failures or turnoffs, abandonment by a parent, and by delays and errors of the IDPA itself. Pl. Ex. 56.

The associate executive director of the United Way of Metropolitan Chicago (formerly the Council for Community Services in Metropolitan Chicago) and the executive director of Marillac House, a settlement house funded by Catholic Charities, testified at trial that the restrictions in the emergency assistance plan significantly increased the burdens placed on the private social service agencies and impaired their normal operations.[6]

(Footnote continued from preceding page.)

their previous residence. They searched alleys for discarded furniture but found little of use. On January 10th, when she received the next AFDC check, Mrs. Gallman purchased some basic furniture. Tr. 160-67.

[6] IDPA referral slips to Marillac House revealed cases where AFDC recipients were denied assistance when their emergencies did not fall into one of the four categories of the revised program. R. 91:

> "Mrs. B. Jackson was robbed of $332 worth of food stamps and $200 cash. She has 11 children in her ADC budget. Robbery, which occurred 2-6-74 was verified by Police Report. Ms. Jackson has received some emergency food from Uptown Center and is in need currently." Pl. Ex. 21.
>
> "Mrs. Love's 3-74 check was reported lost—we have not been able to issue replacement to date and client probably won't receive it until 4-11-74. Family is in need of emergency food." Pl. Ex. 25.
>
> "Requesting food as electricity on their floor was shut off and their food spoiled." Pl. Ex. 27.
>
> "Mrs. Juanita Thomas appears to have abandoned her children to Mr. Lott and her oldest daughter Linda. We are in the process of setting up an ADC case for Linda and her brothers and sisters. Linda is not currently on aid nor has she any resources." Pl. Ex. 33.

Tr. 30ff, 212ff. Seventeen such agencies filed a brief *amici curiae* in the district court in support of respondents' position. R. 52-56, 59-61.

The director and deputy director of the IDPA testified that they constricted the availability of emergency assistance for administrative convenience and to prevent abuses and fraudulent claims. Tr. 365ff., 423ff. No further evidence detailing or corroborating the purported basis of the restrictions was offered. HEW presented no evidence.

The District Court's Decision

On November 21, 1974, the district court ruled that the eligibility limitations of the Illinois program did not violate either the Act or the Equal Protection Clause. It declined to rule on the pendent state claim. With respect to delivery of assistance, the court found delays of 7-10 days were "not uncommon" and in violation of the Act and HEW's "forthwith" regulation, 45 C. F. R. § 233.120(a)(5). The Illinois petitioners were ordered to modify their procedures to expedite delivery and to file a report on the speed of future delivery of emergency assistance. Respondents appealed the denial of an injunction restraining the Illinois petitioners from imposing eligibility requirements in addition to those contained in § 406(e).

The State petitioners then proposed to the district court certain changes to speed delivery. On March 14, 1975, the court entered another order, R. I 11, which required the IDPA to take certain steps to speed up the delivery of assistance in Cook County but denied respondents' request to require Illinois to furnish emergency assistance in downstate counties by a means other than mailing from Springfield, IDPA's central office. Respondents appealed that order.[7]

---

[7] While the two consolidated appeals which became *Mandley I* were pending, the district court issued a third order on August 1, 1975, regarding the delay aspect of the case. It ordered another report on the time taken by State petitioners for delivery of assistance

(Footnote continued on next page.)

The Court of Appeals' Decision in Mandley I

The court of appeals, relying on the Supremacy Clause and the Act, reversed the district court and held that Illinois was in violation of the Act by restricting eligibility for emergency assistance more narrowly than authorized in § 406(e) of the Act. No congressional intent to exclude the class could be found in the words of the statute or its legislative history. This decision rejected HEW's position that Illinois' program was lawfully funded. *Mandley* v. *Trainor,* 523 F. 2d 415 (1975).

Since the court decided the Supremacy Clause issue favorably to respondents it did not reach the equal protection or pendent State law claims. The mandate, which was returned October 24, 1975,[8] provided in part that "[t]he order of November 21, 1974, is reversed insofar as it sustained the validity of the Illinois program for emergency assistance." R. II 20.

Proceedings on Remand to the District Court—Dismissal as Moot

On return of the mandate respondents promptly moved for entry of a final judgment and decree. App. 46-58. On November 17, 1975 IDPA director Trainor publicly stated that the IDPA would continue its illegal program and claim federal funds under §§ 402 and 403 of the Act. App. 83-96. The next day his counsel advised the district court that the "[4]06(e) . . . program will be terminated in a matter of days", and that if the program were continued it would be with "state funds only and no reimbursement sought from the federal government". Tr. 6 (Nov. 18, 1975).

(Footnote continued from preceding page.)

and an explanation to show cause "why some emergency assistance cannot be disbursed by local offices rather than by the centralized procedure which is now in effect." The court directed respondents to file a proposed injunction order "which will incorporate a time schedule for the delivery of emergency assistance checks to recipients, including a specification of those exceptions which are reasonable and necessary to make any injunction order practicable and workable." R. I 10.

[8] The court denied the Illinois petitioners' motion to stay the mandate pending application for certiorari. No petition was filed.

On December 1, 1975 the State petitioners moved to dismiss the case as moot, pleading,

> Effective November 21, 1975, the State of Illinois has withdrawn from participation in the Emergency Assistance Program established under Title IV of the Social Security Act, § 406(e) . . . [and] "the Department of Public Aid . . . is no longer receiving Federal Emergency Assistance Funds. . . ." App. 59 paras. 1, 4.

Shortly thereafter HEW joined in the motion. Respondents answered the motions controverting the facts asserted by petitioners. App. 66-96. Respondents presented evidence that the Illinois petitioners, contrary to their oral and written representations, continued to claim and receive federal funds for emergency assistance and were attempting to deceive the court by a fictitious abandonment of their federal emergency assistance program. Respondents claimed this was a misuse of federal funds.

The district court on December 31, 1975 denied the motions to dismiss. The court expressed its "belief that the defendant will not act irresponsibly or in bad faith to frustrate the attempt of this court and the United States Court of Appeals to enforce the statutes and Constitution of the United States", ordered petitioners to file objections to respondents' proposed final judgment, and continued the case for four months. R. II 46.

HEW in December, 1975 requested and received from this Court an extension of time to petition for certiorari from the judgment in *Mandley I.*[9] It also moved in the Court of Appeals to vacate *Mandley* and for an order directing the district court to dismiss the case as moot. The court of appeals denied the motion on January 30, 1976.

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[9] HEW stated in its application that Illinois had "terminated its emergency assistance program" and that an extension was required to permit the court of appeals to consider a motion to vacate its judgment. Sup. Ct. No. A-537.

In January, 1976 petitioners filed objections to the proposed final judgment, claiming again that the case was moot. App. 97-105. Further, HEW asked the district court not to act on a final order until it obtained a ruling from this Court as to whether *Mandley I* was moot. App. 105.

On March 9, 1976 Trainor in a letter to the Legislative Advisory Committee admitted, "the special needs program we substituted affords the virtually same benefits and employs the delivery system we were using prior to the court's ruling that our program was not in accord with 406(e) of the Social Security Act". R. II 70, Ex. 2. On April 23, 1976 Trainor submitted to HEW, without notice to the district court or respondents, this "special needs program" for reapproval for federal funding labeled "special assistance." R. II 76, Ex. 1. The only difference between this program and the one judged illegally restrictive in *Mandley I* was the changed title, from "emergency assistance" to "special assistance". HEW did not advise the court or respondents that it had received this program, and its counsel on May 19, 1976 indicated to the court that Illinois had not submitted to HEW any plan for emergency assistance.

On July 12, 1976 counsel for the State petitioners admitted to the court Illinois' use of federal funds for its relabeled emergency assistance program but insisted it was not the same program litigated in this case. The district court dismissed the case as moot.

The Court of Appeals' Decision in Mandley II

Respondents appealed the dismissal and on November 23, 1976 the court of appeals reversed, *Mandley* v. *Trainor*, 545 F. 2d 1062. The court ruled that "Illinois cannot evade the Section 406(e)(1) eligibility requirements by relabeling its emergency assistance program as AFDC 'special assistance' while still obtaining matching funds from the federal government." 545 F. 2d at 1070. The court, noting that over three years had passed since the filing of the complaint and over one year since the return of the mandate in the first appeal, considered *sua sponte* the objections of the petitioners to the respondents' proposed final judgment. After modifying certain provisions of the order, the court directed the return of the mandate on the date the decision issued with a direction that the district court enter the order "forthwith". On November 29, 1976 the district judge signed the judgment.

The judgment, App. 142, prohibited Illinois from operating a federally funded program providing emergency assistance which was inconsisent with § 406(e). It granted relief from excessive delays in the delivery of assistance. Restitution was awarded to respondent Gallman. HEW was prohibited from funding State plans for emergency assistance, however designated, which did not comply with § 406(e) and was ordered to promulgate regulations consistent with the court of appeals' rulings. After certiorari was granted, the district court declined to enforce the judgment pending disposition by this Court.

SUMMARY OF ARGUMENT

The purpose of the emergency assistance legislation as stated in § 406(e) of the Social Security Act (Act), 42 U. S. C. § 606(e), is for participating States to make various types of payments, speedily available to needy families without resources, in order to avoid destitution of children or to provide living arrangements for them in a home. Eligibility is based on financial need; no limitation exists as to the cause of the need, even if fault is involved (excepting refusal to accept employment).

Petitioner Illinois Department of Public Aid (IDPA) restricts eligibility, however, by establishing additional eligibility requirements which mandate that the emergency need arise from certain specified events. Petitioner U. S. Department of Health, Education and Welfare (HEW) matches 50 percent of the amounts spent by IDPA as emergency assistance without securing the IDPA's compliance with the Act or with HEW's regulation interpreting eligibility under it.

The United States Court of Appeals for the Seventh Circuit has held that the IDPA cannot restrict the eligibility standard of § 406(e)(1) and that HEW cannot approve Illinois' restricted program for funding by the federal treasury. *Mandley* v. *Trainor*, 523 F. 2d 415 (1975); *Mandley* v. *Trainor*, 545 F. 2d 1062 (1976). The United States Courts of Appeals for the Second and Third Circuits are in accord. *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3rd Cir. 1976); *Lynch* v. *Philbrook*, 550 F. 2d 793 (2d Cir. 1977).

The Supremacy Clause invalidates Illinois' eligibility regulations which are more restrictive than governing federal standards contained in § 406(e). In addition, the IDPA's restrictions violate the Equal Protection Clause because the eligibility distinctions are arbitrary, irrational and invidious. They create two classes of eligible needy families with emergency needs, aiding one class and not the other. This discrimination is illegal. Moreover, the IDPA's restricted program violates § 12-8 of the Illinois Public Aid Code.

I. Title IV-A of the Act, provides for a federal determination of who is eligible for benefits and a State determination of the level of benefits an eligible individual will receive. Under this scheme of cooperative federalism Illinois may not restrict eligibility for emergency assistance more narrowly than Congress' definition in § 406(e) of the Act. Illinois' level of payments is not questioned in this case.

A. The federal definition cannot be varied by a State absent a clearly evidenced authorization in the statute or in its legislative history. *King* v. *Smith*, 392 U. S. 309 (1968); *Townsend* v. *Swank*, 404 U. S. 282 (1971); *Carleson* v. *Remillard*, 406 U. S. 598 (1972); *Burns* v. *Alcala*, 420 U. S. 575 (1975). The respondent class is within the federal statutory definition. Petitioners point to no exclusionary language, nor can they do so. Rather, they argue that federal eligibility standards only set the outer limits of federal matching available to a State. This argument was rejected in *Townsend* v. *Swank*, 404 U. S. 282, 286 (1971) and *Carleson* v. *Remillard*, 406 U. S. 598, 600-01 (1972).

Petitioners also argue that a provision which is silent on emergency assistance, § 402(a)(10), justifies Illinois' exclusion of eligible needy families. The language and purpose of that provision, as explained in the cases cited above, is to assure that States provide assistance to *all* eligible individuals. This subsection is not clear evidence of exclusionary intent. Petitioners' view also contradicts Congress' intent to provide protection from destitution for all children. *King*, 392 U. S. at 330. If the statute be susceptible of two opposing interpretations, it must be read to effectuate, not frustrate, the major purpose of the draftsmen. *Shapiro* v. *United States*, 335 U. S. 1, 31 (1948).

B. The legislative history of § 406(e) confirms the plain reading of the statute. The House and Senate Reports clearly reflect an intent to expand eligibility. Congress determined that emergency needs, without limitation, are to be met at the time the need arises through its authorization of flexible forms of payments by the States. States were not authorized, as petitioners argue, to make a "flexible" determination of who is eligible for this aid.

Petitioners argue that an obsolete HEW regulation 45 C. F. R. § 233.120(a)(1) (1969), authorizes Illinois to specify who is eligible for emergency assistance. Both the federal and State petitioners overlook HEW's superseding regulation, 45 C. F. R. § 233.10(a)(1)(i) and (ii)(A) (1974), which applies to "public assistance" eligibility, including the emergency assistance program, and prohibits States from restricting the statutory eligibility determination absent an authorization in the Act or its legislative history.

The holding in *Mandley I* is based on the conflict between the federal eligibility definition in § 406(e) of "emergency assistance to needy families with children" and Illinois' definition of an "emergent [sic] need." This holding is consistent with the holdings of the cases above cited and with the Secretary's regulation enforcing the federal eligibility standards. 45 C. F. R. § 233.10(a)(1)(i) and (ii)(A) (1974).

II. After *Mandley I* the Illinois petitioners decided that abandonment of federal funding for emergency assistance was "totally unacceptable". App. 74. With the backing of the federal petitioner, HEW, the State devised a plan to avoid compliance with *Mandley I* whereby Illinois would relabel its emergency assistance program as "special assistance" and HEW would approve claims for federal funding as "special need" items under the aid to families with dependent children (AFDC) program.

A. If petitioners believed that funding emergency assistance as "special needs" was a legitimate alternative to the congressional plan, it is likely that they would have raised it as a defense long before they did. They first raised it in the court of appeals in *Mandley II.*

Their claim is without foundation. The federal petitioner acknowledged that neither Congress nor he has defined "special needs" or "special emergency need." HEW has a "special need" regulation, 45 C. F. R. § 233.20(a)(2)(v), which is silent on emergency assistance. Its predecessor in the agency's Handbook of Public Assistance Administration, Part IV, § 3131(3) (1966) does not describe this assistance either. Not cited by petitioners are other sections of this Handbook covering "emergency situations," §§ 3434.2 (1962), 5233 (1959), and 5520 (1951). The "special need" regulation is not authority for approving Illinois' retitling of its program.

Congress for the first time made express provision for emergency assistance in enacting § 406(e). Even if HEW had reimbursed emergency assistance provided as a "special need" prior

to 1968, Congress' enactment of §406(e) superseded any administrative practice or authority to continue to do so.

B. Congress has not granted dual authority for funding emergency assistance as petitioners claim. Sections 406(e) and 403(a)(5) reflect Congress' intent to induce the States to aid all children facing destitution. It chose one means in order to preclude patchwork provision of emergency assistance by the States. The distinct funding provisions for emergency assistance, § 403(a)(5), and for AFDC, § 403(a)(1), reflect this.

Section 406(e) specifies that if a State elects to provide the assistance authorized therein, provision for such assistance must be made in the State's plan under § 402(a). No variance exists between the express words of §§ 406(e) and 403(a)(5) and their legislative history regarding this specification. Congress, having so specifically directed the eligibility for and provision of the assistance, has necessarily excluded any other general means of providing it. *Williams* v. *Wohlgemuth,* 540 F. 2d 163, 169 (3d Cir. 1976).

Petitioners, in essence, argue that the attachment of "strings" to federal funds is unreasonable. Such an argument was long ago laid to rest. *Helvering* v. *Davis,* 301 U. S. 619, 645 (1937). To allow the result petitioners urge would be to grant HEW the power to veto the express words of §§ 406(e), 403(a)(5) and the legislative history.

III. The final judgment approved and ordered entered in *Mandley II* can be sustained on alternative grounds of the Equal Protection Clause or of Illinois law.

A. Illinois' program creates two classes of families with needy children who are living with a relative, without resources, and for whom aid is necessary to provide living arrangements or to avoid destitution. One class can receive assistance because its need arose from Illinois' selected crisis situations; the other class cannot because its need arose from other crisis situations.

1. Illinois' arbitrary selection of *events* from which destitution threatens does not rationally further the purposes of

§ 406(e) or any other legitimate articulated State interest. *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973). *Burrell* v. *Norton*, 381 F. Supp. 339 (D. Conn. 1974). The State petitioners' desire to enhance administrative ease is not a sufficient basis for absolute disqualification of families from emergency assistance. *Vlandis* v. *Kline*, 405 U. S. 645, 656 (1972). Nor is their desire to avoid possible "abuses" of the program a ground to conclude all otherwise eligible needy families are submitting fraudulent applications. *Jimenez* v. *Weinberger*, 417 U. S. 628 (1975). Illinois has adequate alternative methods to handle fraudulent claims. Saving money seems to be the State's true purpose. That can be accomplished but not in the manner chosen. *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969).

2. In addition, the arbitrarily excluded class is denied or threatened with denial of the fundamental right to survive. The classification is therefore subject to strict judicial scrutiny, and such scrutiny reveals no compelling State justification. This case differs from *Dandridge* v. *Williams*, 397 U. S. 471 (1970) and *Jefferson* v. *Hackney*, 406 U. S. 535 (1972). Those cases involved solely reductions in the amount of aid needy families received. In the instant case families have no resources and receive *no* aid. Individual and societal interests coincide to compel the granting of this aid because relief of individual suffering guards against the instability inherent in destitution. *Goldberg* v. *Kelly*, 397 U. S. 254, 265 (1970).

B. Section 12-8 of the Illinois Public Aid Code authorizes provision of emergency assistance to families eligible for AFDC in a variety of need situations and "in other circumstances causing privation." The command of the statute is mandatory and not, as the State petitioners suggested below, a mere "administrative device." *Figures* v. *Swank*, 128 Ill. App. 2d 211, 263 N. E. 2d 559 (1970); *County of Cook* v. *Ogilvie*, 50 Ill. 2d 379, 280 N. E. 2d 224 (1972).

IV. The court of appeals in *Mandley II* ordered the district court to enter respondents' proposed final judgment and decree as modified. This direction granted necessary relief against the petitioners to enforce the *Mandley I* judgment and to secure the rights of the respondents.

A. The federal petitioner neither sought review of *Mandley I* in this Court nor followed the court of appeals' suggestion that it issue a new regulation on emergency assistance to guide the States in complying with the congressional eligibility criteria. Since the petitioners on remand withheld good faith compliance from the district court, the court of appeals, in order to give effect to the policy of Congress, properly exercised its mandamus and equitable powers to require HEW to perform its mandatory duty to issue regulations "not inconsistent" with the Act, and to restrain approval of plans inconsistent with § 406(e). HEW's argument that § 406(e) does not require regulations is contrary to the policy of Congress. Act, § 1102, 42 U. S. C. § 1302; *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663 (2d Cir. 1973). Respondent families in Illinois have been injured because HEW has failed to administer the Act properly. Petitioner's conduct has made necessary the relief granted in *Mandley II*.

B. The Illinois petitioners have not completely abandoned federal funding of emergency assistance because that option is "totally unacceptable." App. 74. They are subject to the final order.

When directed by the district court after *Mandley I* to file objections to the proposed final judgment, the State petitioners offered no objections to the facts, conclusions or specific orders pertaining to delays. Nor did they raise any objection before the court of appeals in *Mandley II*. The Illinois petitioners, therefore, waived their objection to the judgment's provision requiring them to overcome delays by determining eligibility and authorizing payments of assistance within a 24 hour standard.

The district court found in November, 1974, that delays of 7-10 days in delivery were "not uncommon" and violated the Act and 45 C. F. R. § 233.120(a)(5), requiring "forthwith delivery". The final judgment incorporated the district court's conclusions and findings on this issue. In addition, when the State provides emergency assistance HEW regulations exempt it from the strict quality control and financial penalties for improper authorizations that apply to AFDC. 45 C. F. R. §§ 205.40 and 205.41. Illinois' administrative procedures for determining eligibility and authorizing payments which result in delays must yield to the federal policy of "forthwith" payment.

ARGUMENT

I.

No Authorization Exists in the Social Security Act or Its Legislative History for Illinois' Exclusion of Eligible Individuals from Emergency Assistance to Needy Families with Children.

Title IV-A of the Social Security Act (the Act) authorizes a joint federal-State program of aid and services to needy families with children. §§ 401-410, 42 U. S. C. §§ 601-610. The general scheme of cooperative federalism in this Title is a federal determination of who is eligible for benefits and a State determination of the level of benefits an eligible individual will receive. *E.g., King* v. *Smith*, 392 U. S. 309 (1968).

Respondents' position, which the court of appeals in *Mandley I* upheld, is that Illinois may not restrict eligibility for emergency assistance to needy families with children more narrowly than the eligibility definition of § 406(e) of the Act. Respondents have not challenged Illinois' power to determine how much it will pay in emergency assistance to families made eligible by Congress. Nor have they asserted that Illinois may not make payments of AFDC, which are not payments as emergency assistance, as "special needs".

A. The Emergency Assistance Definition in Section 406(e) of the Act Sets the Standard of Eligibility.

Congress has authorized federal reimbursement for amounts paid out by States as emergency assistance as follows. Section 401 states the public purposes for grants to States for aid and services to needy families with children and authorizes an appropriation to carry out those purposes:

> There is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Section 403 of the Act provides:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall . . . pay each State which has an approved plan for aid and services to needy families with children, for each quarter . . . (5) in the case of any State, an amount equal to 50 percentum of the total amount expended under the State plan during such quarter *as* emergency assistance to needy families with children. (Emphasis added.)

The eligibility definitions of Title IV-A are contained in § 406. That section states, "When used in this part . . ." (referring to Part IV-A of the Act, §§ 401-410) "emergency assistance to needy families with children" means assistance paid by the State to a (1) family with a needy child under age 21, (2) living now or recently with a relative specified in § 406(a), (3) who is without available resources and (4) the assistance is necessary to avoid destitution or to provide living arrangements in a home, and (5) whose need did not arise because such child or relative refused without good cause to accept employment or training for employment, but

> . . . only with respect to a State whose State plan approved under § 602 [§ 402 of the Act] of this title includes provision for such assistance.

Section 402(b) provides, "The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section." Subsection (a) specifies 28 requirements that a plan must meet to obtain approval.

The court of appeals in *Mandley I* applied the principle of statutory construction enunciated in a series of cases beginning with *King* v. *Smith*, 392 U. S. 309 (1968). This principle invalidates a State's denial of federally funded welfare payments or services to individuals made eligible by Congress in the Act. If the challenged State exclusion is not clearly authorized on the face of the Act, any departure from the statutory eligibility standard must be clearly evidenced by the legislative history. Also, *Townsend* v. *Swank*, 404 U. S. 282 (1971); *Carleson* v. *Remillard*, 406 U. S. 598 (1972); *Burns* v. *Alcala*, 420 U. S. 575 (1975). *Mandley I* adheres to these cases. The respondent class are persons included in the federal eligibility standard.

Their inclusion is confirmed by the court of appeals' analysis that "Section 406(e) specifically permits two areas of state discretion," *Mandley I*, 523 F. 2d at 420: (1) the form of the payment to be made (money payments, payments in kind, or other form of payment "as the State agency may specify"), and (2) whether migrant worker families will be eligible.[10] "This particularization of the area of state authority is itself cogent evidence that Congress did not also authorize the State [further] to limit eligibility. . . ." *Townsend*, 404 U. S. at 287.

Petitioners argue that § 406(e)(1) does not require them to aid all individuals made eligible by Congress but merely sets the outer limits of eligibility. Fed. br. at 29-30, Il. br. at 24. They do not point to any clear supporting statutory language. Petitioners would have this Court disregard *Burns*, *Carleson*, *Townsend* and *King* because their application prevents petitioners from having complete freedom to use federal funds as they deem best. Such an arrangement this Court has not seen fit to sanction. *E.g.*, *Rosado* v. *Wyman*, 397 U. S. 397, 420-423 (1970); *Townsend*, 404 U. S. at 291-92. Neither did the court of appeals in *Mandley I* or in *Mandley II*.

Mandley I is also consistent with *Batterton* v. *Francis*, ______ U. S. ______, 53 L. Ed. 2d 448 (1977), in which this Court upheld Maryland's restrictive definition of "unemployment" in determining eligibility for the AFDC/unemployed father program of § 407. Section 407 on its face made eligible a child "who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father." HEW's standards authorized the exclusion complained of. In contrast, as the court of appeals in *Mandley I* correctly found, Congress has not delegated to the States or to the Secretary the power to exclude any individuals eligible under § 406(e)(1).

Petitioners argue that a State need not honor the § 406(e) definition because subsection (10) of § 402(a), which requires States to furnish AFDC with reasonable promptness to all eligible individuals, does not specifically mention the furnishing of emergency assistance. Respondents believe the result reached by the court of appeals would have been the same whether subsection (10) does or does not apply to the provision of emergency assistance.

The holding in *Mandley I* is based on the conflict between the federal eligibility definition of "emergency assistance to needy families with children" and Illinois' definition of an "emergent [sic] need". App. 25, 44.

This follows the operative principle in *King*, *Townsend*, *Carleson* and *Burns*, which is that those made eligible by § 406(a) may not be denied assistance absent evidence of clear legislative authorization to exclude them. In *King*, for example, the Court held, "The regulation is therefore invalid because it defines 'parent' in a manner that is inconsistent with § 406(a) of the Social Security Act." 392 U. S. at 333. The same reasoning applies to § 406(e). This is also the construction HEW has applied in its regulation adopting these holdings, 45 C. F. R. § 233.10(a)(1)(ii)(A), which prohibits "more limited *public assistance* coverage than that provided by the Act. . . ." (Emphasis added.)

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[10] The statute also authorizes two other areas of discretion reserved to HEW, one concerning how recently a child must have lived with a relative described in § 406(a) and the other pertaining to what services a State may offer.

Subsection (10) is silent with regard to emergency assistance, as are all subsections of § 402(a). This silence cannot negate the plain language of § 406(e) and its legislative history. Petitioners do not present any evidence that subsection (10) made emergency assistance eligibility optional.

In any event, if a State incorporates § 406(e) into its plan, § 402(a)(10) then comprehends "emergency assistance to needy families with children" and therefore binds States to mandatory eligibility under § 406(e) as it does under § 406(a).

When Congress enacted the emergency assistance provisions in 1968 it did not explicitly amend § 402 to add "emergency assistance to needy families with children" at every relevant point, presumably because it is an optional program and the "must provide" requirements of § 402(a) do not become operative until a State opts to participate in this additional program of aid and services. It would be extraordinary, however, to conclude from this that Congress thereby intended that claimants of emergency assistance be *denied* the right to (a) the opportunity to make application, (b) the furnishing of emergency assistance with reasonable promptness, see *Adens* v. *Sailer*, 312 F. Supp. 923, 926 (E. D. Pa. 1970), and (c) the furnishing of emergency assistance to all eligible individuals, as required by § 402(a)(10). It would further be surprising that Congress intended to deny the "fair hearing" right to emergency assistance claimants, § 402(a)(4), or that the standard of need would not be applied to emergency assistance, § 402 (a)(7). HEW admits that "[m]ost of the requirements set forth in Section 402(a) apply equally to AFDC and EA programs." Fed. br. 30.

The lack of clear authority in subsection (10) to exclude individuals eligible for emergency assistance is also apparent from its legislative history. The purpose of this provision, added in 1950, was to assure that *all* individuals eligible for assistance received some aid. Act of August 28, 1950, ch. 809, §§ 321 *et seq.*, 64 Stat. 548; S. Rep. No. 1669, 81st Cong., 1st Sess. 16-17 (1949); H. R. Rep. No. 1300, 81st Cong., 1st Sess. 43 (1949); *Jefferson* v. *Hackney*, 406 U. S. 535, 544-45 (1972); See also, *Townsend*, 404 U. S. at 291-92.

No indication exists that Congress meant to limit eligibility for emergency assistance through subsection (10). This view would require us, in the words of *King*, 392 U. S. at 330,

> . . . to assume that Congress, at the same time that it intended to provide programs for the economic security and protection of *all* children, also intended arbitrarily to leave one class of destitute children entirely without meaningful protection.

This would be a particularly astounding conclusion in light of the unmistakable purpose of the emergency assistance legislation to provide a fast and flexible method of delivery of assistance in times of crisis, legislation which expanded rather than contracted the AFDC program.

A statute must be read, "assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 335 U. S. 1, 31 (1948). Petitioners have yet to explain how Illinois' conduct with respect to, for example, respondent Gallman, furthers the purposes of either § 406(e) or of the Act as a whole. Her case is, indeed, an example of the thwarting of the explicit congressional policy to protect needy children in crisis.

B. The Legislative History Confirms That § 406(e)(1) Eligibility Standards Are Binding on Participating States.

A plain reading of § 406(e) reflects that Congress did not clearly authorize State deviation from federal eligibility standards contained therein. The policy expressed in the words of the statute is reasonable. This Court need look no further for Congress' intent. Should it, however, examine the legislative history, the intent reflected there fully supports the court of appeals' conclusion that Congress did not authorize the States to vary eligibility requirements from federal standards.[11]

The emergency assistance provisions grew out of omnibus amendments to social security legislation introduced by the Johnson Administration in 1967. One proposed amendment to the public assistance titles was a provision to require all States to pay full need according to respective standards of need (thereby eliminating maximum grants and percentage reductions in the level of benefits). Another proposal was a program for 60 days temporary assistance to migrant workers on a pilot project basis. H. R. 5710, § 207, 90th Cong., 1st Sess. 9. The full need provision, which would have required significant increases in welfare spending by the States, was not contained in the bill, H. R. 12080, reported out by the House Ways and Means Committee. However, the bill expanded considerably on the proposal for temporary assistance for migrant workers by adopting a provision which, in modified form, became § 406(e).

Eligibility under the new program was described in the general discussion of the bill as follows:

> . . . The eligible families involved are those with children under 21 who either are or have recently been living with close relatives. The families do not have to be receiving or eligible upon application to receive AFDC (although they are generally of the same type), but they must be without available resources and the payment or service must be necessary in order to meet an immediate need that would not otherwise be met.

S. Rep. No. 744, 90th Cong., 1st Sess. 166. The report confirmed the statutory provision that assistance might be provided in any form. This was to allow States flexibility in meeting need at the time of the emergency. It also confirmed the statutory option for State participation in providing emergency assistance.

On the floor of the House, Representative Wilbur Mills, Chairman of the Ways and Means Committee, speaking in favor of the bill, stated, "The bill would provide for a new program of emergency assistance for families for a temporary period. This new program would allow Federal matching for a wide variety of services which families may need in an emergency situation for a short period of time. . . ." 113 Cong. Rec. 23054.

In the Senate, Senator Mansfield speaking in favor of the bill after the Conference Report, explained the provisions as follows:[12]

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[11] The text of the Senate Report on the emergency assistance provision is set forth in the Appendix to this brief.

[12] See also comments of Senator Ribicoff, 113 Cong. Rec. 32853; Senator Long, (113) Cong. Rec. 32592; Senator Curtis, 113 Cong. Rec. 36319. The Secretary infers from the latter Senator's remarks on the Senate floor (br. 20, N. 11) that the principal purpose of § 406(e) was to extend eligibility for emergency assistance to persons not eligible for it under the AFDC program, and from that inference concludes Congress recognized an authority in HEW to reimburse emergency assistance prior to the enactment of § 406(e). The Secretary's inference does not appear to be justified. The Senator said that reimbursement of emergency assistance "has not been in the law before," and it "can be paid in cases where they cannot meet other qualifications." No clear antecedent appears for the words "they" or "qualification." The Secretary suggests "recipients" and "such as eligibility for AFDC", a word and phrase respectively which do not appear in the text. Since it is the States' and not individuals that must meet the qualifications for federal matching and the Senator referred to States twice, these are more logically the reference for "they." Whatever the correct inference may be, an inference would hardly outweigh the clear language of the statute and reports.

> Families with emergency trouble will be able to receive emergency assistance in whatever form it is best for them at their time of need. Families which have been burned out, suffered personal tragedies and such will be able to get money, medical care, shelter provided, food sent in, or whatever else is needed to deal with the crisis. The committees are to be commended for adding this provision, thus, recognizing that emergencies which strike families cannot be dealt with by business-as-usual methods. . . . 113 Cong. Rec. 36925.

Petitioners argue that the description of flexibility in the form of emergency assistance in the legislative history requires a conclusion that Congress intended wide State flexibility in setting eligibility standards. Fed. br. 33, Il. br. 25. Flexibility in form of payment was to enable a State to meet the emergency need at the time of the need. Remarks of Senator Ribicoff, 113 Cong. Rec. 32853; Senator Mansfield, *id.* at 36925; Representative Mills, *id.* at 23053. This does not justify an inference that the Congress also intended to allow States flexibility in determining who would be eligible to receive this prompt assistance.

The Secretary further argues that the cost resulting from the congressional eligibility standard would have been greater than the projected federal cost, raising, he argues, an inference that "full" eligibility was not intended. Similarly, Illinois argues that expansion of eligibility would require a choice between increasing the welfare budget or drastic reduction of benefits, which, they say, is "no choice at all."

These arguments fail for several reasons. First, the option to participate leaves Illinois and other States free to protect the welfare budget, and that option was quite probably a factor in the level of appropriation.

Second, the 1967 projected cost estimate for 1972 of $35 million in federal payments is not clear evidence that Congress meant the State to have freedom to narrow the eligibility standards. If matched by State funds (at the 50-50 rate) it would total

$70 million. Illinois which has approximately 5 percent of the nation's population[13] would receive on a per capita basis $3.5 million, about double the amount it paid out as emergency assistance in 1972 before it severely restricted the program. The Secretary concedes, br. 34, n. 23, that the federal share "has cost less than Congress anticipated," $22 million instead of $35 million.

Third, Illinois in its pre-1973 program, which nearly met the eligibility standard of § 406(e)(1), paid only 0.14[14] percent of its public aid budget as emergency assistance, which makes its fear of facing drastic budget increases or benefit cuts less than well founded.

The legislative history reveals no "clear authorization" to the States or to the Secretary to permit the arbitrary "help-one-abandon-another" eligibility scheme at issue here. This is the unanimous conclusion of the circuit courts of appeals which have considered the question. *Mandley* v. *Trainor*, 523 F. 2d 415 (7th Cir. 1975); *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3rd Cir. 1976); *Lynch* v. *Philbrook*, 550 F. 2d 793 (2nd Cir. 1977). On the contrary, the history shows that as a "liberal"[15] provision of the 1968 amendments, Congress intended to ensure, despite belt-tightening in other areas, that the nation's children who face health or life threatening crises would be protected.

If the language and history of § 406(e) rule out State authority to vary eligibility requirements, it seems highly improbable that an HEW regulation could give a State this power. Yet this is the claim, based on 45 C.F.R. § 233.120(a)(1)(1969), advanced by the Secretary and the Illinois petitioners. Fed. br. 28, Il. br. 25. Both petitioners in their respective briefs overlook HEW's superseding regulation, which applies to emergency assistance and denies States this power. 45 C. F. R. § 233.10(a)(1)(ii)(A) (1974). See Appendix to this brief. It may seem surprising that one governmental agency would overlook an important regulation which the court of appeals found relevant, 523 F. 2d at 421, but when two separate governments having intimate knowledge of HEW's regulations do so, it leaves the strong impression that the failure to discuss or cite it was more than an oversight.[16]

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[13] According to 1970 census statistics Illinois' population was 11,112,797, 5.5 percent of the United States' population, which was 203,211,926. General Population Characteristics for the United States, Summary, 1970 Census of Population, P. C. (1-B1) Jan., 1972; General Population Characteristics for Illinois, Summary, 1970 Census of Population, P. C. (1-B) Oct., 1971.

[14] ILL. DEPARTMENT OF FINANCE, 55TH ANNUAL REPORT FOR FISCAL YEAR 1972 (1973) at 193. The total budget for 1972 was $1,182,595,500. Emergency assistance expenditures totalled $1,665,481. Int. 24-26, R. 65.

[15] See remarks of Senator Curtis, 113 Cong. Rec. 32853.

HEW's "Townsend regulation," 45 C. F. R. § 233.10(a)(1) (i) and (ii), provides as follows:

> (i) A State shall impose each condition of eligibility required by the Social Security Act; and (ii) A State may:
>
> (A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage; . . .

Prior to promulgation of these subsections, in *Carleson*, the Solicitor General's Memorandum for the United States as Amicus Curiae (at 8-9) had expressed the fear that if the Court meant what it said in *Townsend*, most State plans would be invalid. This Court repeated that it "expressly disapproved" the HEW policy that permitted States to vary eligibility requirements from federal standards. *Carleson*, 406 U. S. at 600-01. When the "Townsend regulation" was published on July 24, 1974, 39 Fed. Reg. 26,912, the Acting Secretary there noted that he had frequently received the following comment on the regulation as proposed:

> 2. The regulation should be broader to permit the States to limit coverage as well as impose additional eligibility conditions; . . .

HEW's response was as follows:

> 2. The current state of the law as interpreted by the United States Supreme Court does not permit a broader regulation.

This regulation applies to "financial assistance programs," of which emergency assistance is one. With this provision in view, HEW's plea for deference to § 233.120(a)(1) fails. One, any reliance by a State on 45 C. F. R. § 233.120(a)(1) to cut back eligibility from the federal standard after *King* was dubious, and after *Townsend, Carleson,* and the promulgation of 45 C. F. R. § 233.20(a)(1)(ii)(A), a plain disregard of federal law and policy.

Two, the Secretary's argument that 45 C. F. R. § 233.120 (a)(1) is "without amendment", Fed. br. 28, is not correct except in a most technical sense, since it was superseded by 45 C. F. R. § 233.10(a)(1)(i) and (ii). Section 233.120(a)(1) should have been amended to conform to the superseding regulation at the time the latter was issued.

Three, a regulation challenged within five years of its promulgation is difficult to label "long-standing."[17]

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[16] Nor does the Massachusetts brief amicus curiae mention or cite 45 C. F. R. § 233.10(a)(1)(i) and (ii)(A). The New Jersey brief amicus curiae, however, states, br. 17, that this regulation was relied upon in *Mandley I* and *Williams* v. *Wohlgemuth*, 540 F. 2d at 170. New Jersey argues that it does not apply in *Mandley*. These States offer no arguments in addition to those petitioners present, and therefore they do not appear to warrant response. These States are defendants in pending federal court cases involving § 406(e); *Ingerson* v. *Sharp*, 423 F. Supp. 139 (D. Mass. 1976), appeal pending, and *Wise* v. *Klein* (D. N. J. No. 76-274, filed 1976).

[17] Nor can respondents make a convincing claim of congressional acquiescence in the regulation HEW relies on. First, it was superseded as discussed. Further, extensive welfare reform legislation was considered by the 91st and 92nd Congresses, including the emergency assistance provisions, but the entire legislative package died because the conferees "were unable to agree on the underlying principle of welfare reform. All efforts to amend AFDC were postponed for another session of Congress." *Burns*, 420 U. S. at 585.

Several miscellaneous provisions (not pertinent here) affecting the AFDC program and contained in another title of the social

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Thus, to the extent this legislative history sheds any light, it tends to rebut the claim that Congress by silence has acquiesced in HEW's view of the 1968 emergency assistance provision. See *Burns*, 420 U. S. at 585-86.

The restrictive eligibility requirements which Illinois has imposed and which HEW has approved are contrary to the Act. The legislative history discloses no authorization for these restrictions. *Mandley I* should be affirmed.

II.

HEW LACKS AUTHORITY TO APPROVE REIMBURSEMENT OF EMERGENCY ASSISTANCE RELABELED "SPECIAL ASSISTANCE" WHICH EXCLUDED NEEDY FAMILIES ELIGIBLE UNDER § 406(e).

After *Mandley I* the Illinois petitioners decided that abandonment of federal funding for emergency assistance was "totally unacceptable."[18] App. 74. But they would not comply with *Mandley I* because they believed expanding eligibility would cost more money. App. 72-76; Il. br. 28-29. Thus they embarked, with the help of HEW, on a simple plan to relieve themselves of the "dilemma," Il. br. 28, posed by judicial enforcement of § 406(e)(1). Illinois renamed the program "special assistance" and submitted it to HEW for approval for funding as "special needs", Il. br. 7-8, under the AFDC program funded through § 403(a)(1). The Secretary admits that "in place of that program [held illegal in *Mandley I*], the State began paying

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security bill did pass. However, the amendment to § 403(a)(5) to which the Secretary alludes was not one of them. This amendment was a small section of the lengthy State and Local Fiscal Assistance Act of 1972, which was not a social security bill. It had no bearing on eligibility but only reduced from 75% to 50% federal participation in services which the Secretary may authorize under § 406(e)(1)(B).

[18] Ill. Rev. Stat. ch. 23, § 12-4.5 directs Illinois to obtain all available federal funds.

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emergency benefits under its AFDC program, subject to essentially the same eligibility restrictions and coverage limitations, and receiving federal reimbursement pursuant to § 403(a)(1)." Br. 14. Illinois admits that "the 'special assistance' program provides virtually the same benefits as was provided by the § 406(e) emergency assistance program." Br. 21. The petitioner governmental agencies and respondents, then, are in full agreement that Illinois, with the backing of HEW, devised this method to avoid *Mandley I*.

Petitioners' asserted belief that "special assistance" is a legitimate alternative to § 406(e) is belied by their failure to raise it as a defense prior to their argument before the court of appeals in *Mandley II*. They attempted, moreover, to hide their "special assistance" program from judicial scrutiny. This leaves the distinct impression that they lacked confidence in the validity of the purported alternative. The court of appeals in *Mandley II* correctly struck down this "artifice." *Mandley II*, 545 F. 2d at 1067.

A. HEW Lacks Authority to Fund Emergency Assistance Payments Under Its "Special Need" Regulation.

Petitioners' principal argument in support of their "double-funding" theory is that HEW had authority to reimburse emergency assistance prior to the enactment of §§ 406(e) and 403(a)(5) in 1968. These provisions, they say, were merely tacked on to this pre-existing authority for the purpose of including families not eligible for AFDC and to authorize payments other than money.[19] This pre-existing source supposedly supplied the power to approve a "special need" or "special emergency need." Fed. br. 15-16. Congress has not defined these terms and neither, concedes the Secretary, has he. An HEW regulation, 45 C. F. R. § 233.20(a)(2)(v), purports to allow a State to recognize "special need items" for AFDC recipients but does not identify the items and is silent on "special emergency needs." Nevertheless, the Secretary states "it has been well understood that the term includes . . . emergency needs." Br. 16. Understood by whom is not stated. Respondents do not believe HEW possessed authority to reimburse payments for emergency assistance as "special needs" prior to, or after, the 1968 legislation.

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[19] They do not mention that Illinois' "special assistance" would not be speedily available under AFDC since, as the Committee reports observed, the process of determining eligibility and authorizing payments had precluded States from meeting emergency needs. H. R. Rep. No. 544, 90th Cong., 1st Sess. 109; S. Rep. No. 744, 90th Cong., 1st Sess. 165-66.

The Handbook of Public Assistance Administration, Part IV, § 3131(3) (1966)[20] contains the "special need" provision later issued at 45 C. F. R. § 233.20(a)(2)(v). Like its successor regulation, this Handbook material contains no description or even mention of "emergency assistance." Several other provisions of the Handbook, however, do mention "emergency situations," § 3434.2 (1962); "emergency payee," § 5233 (1959); "emergency situations" before "complete investigation of eligibility," § 5520 (1951).[21] These Handbook Sections are set out in the

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[20] "If provision is made for special needs in State's plans under titles I, IV, X, XIV, and XVI, the circumstances so recognized must be such as to necessitate expenditures not necessary for all individuals. The State plan must contain a description of the specified circumstances affecting the need of individuals which the State agency will recognize by including additional consumption items for all individuals in those circumstances. A differentiation can be made for different living arrangements, such as costs for room and board, restaurant meals, or nursing home care."

[21] Sections 3434.2 and 5233 purported to allow a narrow expansion of caretaker eligibility under § 406(a) when a child already receiving AFDC lost his or her caretaker relative because of death, desertion, imprisonment, or commitment to a mental hospital and was in the care of a non-relative "acting for relatives." However, § 406(a) did not authorize payments to non-relatives except after 1961 through foster home care under § 408 once a judicial placement was made (which required time). Section 5520 claimed to encourage States to pay AFDC applicants in emergency situations before the full eligibility investigation was completed. This encouragement was undermined by the subprovision of § 5520 inform-

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Appendix to this brief. The Secretary does not cite these sections. They do not pertain to and are not described in the "special need" regulation, § 3131(3). The absence of mention of emergency needs in § 3131(3) coupled with its presence in other sections of the Handbook is a strong indication that § 3131(3) was not an established source or permission for "special emergency needs."

In practice, "special need" items have been used by States with HEW approval to meet regular recurring expenses for many but not all recipients. Common examples are allowances for laundry, telephone, special diets, medicine chest supplies, expenses for securing employment, medical transportation, property repairs, insurance, housekeeper service, child care and education expenses.

HEW's most recent edition of "Characteristics of State Plans for Aid to Families with Dependent Children Under the Social Security Act, Title IV-A" relates only an incidental use by a handful of States (California, Hawaii, North Dakota, Rhode Island and Wisconsin) of "special circumstances items" to meet emergency needs as AFDC "special needs." The Secretary advises this Court, br. 16, that 45 States provide special need items but fails to mention that in practice only five States include a few emergency needs. States that meet emergency needs do so usually under the emergency assistance program established by § 406(e).

HEW funding of emergency assistance as "special needs" is not authorized by its "special needs" regulation.

(Footnote continued from preceding page.)

ing a State that such payments were "on its own responsibility" and "cannot be matched with Federal funds until investigation is completed and eligibility established." § 5520(3)(b) and (d). These Handbook references to emergencies, §§ 3434.2, 5233, 5520, were narrowly limited and of questionable validity as authority for HEW funding of emergency assistance.

B. Sections 406(e) and 403(a)(5) Preclude Petitioners' Double Funding Theory for Emergency Assistance.

The language of § 406(e), and its companion, § 403(a)(5), reflect Congress' intent to provide one means of funding State plans for emergency assistance in order to accomplish its purpose of alleviating the destitution of needy children. Any preexisting administrative authority to provide emergency assistance was superseded by these provisions. The express language of the provisions precludes the dual authority petitioners claim. If their double funding theory were allowed, the States would be able to exercise an amendatory veto over congressional eligibility policy and thus defeat the purpose of the legislation. *Mandley II* properly interprets the statute and its legislative history to prohibit Illinois' and HEW's circumvention of Congress' explicit eligibility provision.

To encourage States to meet the emergency needs of the families defined in § 406(e), Congress has distinctly separated the funding of emergency assistance from that of aid to families with dependent children. The funding provision, § 403(a), requires in relevant part, as follows:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall . . . pay to each State which has an approved plan for aid and services to needy families with children. . . .
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> * * * * *
>
> (1) in the case of any State . . . an amount equal to the sum of the following proportions of the total amounts expended during such quarter *as aid to families with dependent children* under the State plan. . . . (Emphasis added.)[22]
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> * * * * *
>
> (5) in the case of any State, an amount equal to 50 per centum of the total amount expended under the State plan during such quarter *as emergency assistance to needy families with children*. (Emphasis added.)

Assistance under AFDC is limited in § 406(b) to "money payments," "medical care," or "remedial care." Emergency assistance, however, may also be provided by "payments in kind, or such other payments as the State agency may specify . . .," and "such services as may be specified by the Secretary." § 406(e).

The language of §§ 406(e) and 403(a)(5) reflect that Congress meant to compensate States that made payments *as* emergency assistance to needy families with children without regard to how a particular State might title the assistance. It did not authorize alternative provisions for emergency assistance under § 406(e) and also under § 402(a) as a "special need." Congress specified that the provision for emergency assistance must be incorporated into a State plan for "aid and services to needy families with children" required by § 402(a). "Special needs," if given, would also be included in the State's § 402(a) plan. Congress' definition of emergency assistance must be followed in a State plan if a State grants emergency assistance. Any "special need" provision for emergencies inconsistent with Congress' definition would be invalid. Here, as elsewhere, the specific controls the general. ***Williams*** v. ***Wohlgemuth***, 540 F. 2d 163, 169 (3rd Cir. 1976).

Thus, to the extent that regulations may have authorized HEW to make payments for emergencies, they were superseded by the congressional enactment of § 406(e), which gave clear authority and direction for State provision of emergency assistance. The congressional view reflected in the legislative history is that HEW had not provided for emergency assistance. Congress created a "new program",[23] a "change in the present law,"[24] under which, "for the first time, the Federal Government will match money for emergency assistance," a provision "many of the States have asked for."[25] This was also HEW's view as reflected in the testimony of its sole witness at the hearings of the Senate Committee on Finance on the 1968 amendments. Undersecretary Wilbur J. Cohen stated,

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[22] According to HEW, the reimbursement formula varies from 50% to 83⅓%. Br. 26.

[23] H. R. Rep. No. 544, 90th Cong., 1st Sess. 4; 113 Cong. Rec. Cong. Rec. 23053, 36319.

[24] 113 Cong. Rec. 32853.

> There is no mechanism in the existing Federal law to meet the special needs of children which may arise in a crisis situation.

Social Security Act Amendments of 1967, Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess. 270.

Significantly, petitioners do not advocate a statutory analysis contrary to that of the court of appeals. The Secretary states, without support from the words of the statute, that "nothing" (br. 15) in Title IV-A precludes what Illinois dispenses as "special assistance." To the contrary, nothing in § 406(e) allows a State to restrict eligibility once it decides to enter the program. This Court's decisions have interpreted Title IV-A to place the burden upon the government wishing to exclude federally eligible individuals to demonstrate that Congress clearly authorized the exclusion (Part I, *supra*). The petitioners have not met that burden.

Petitioners suggest, Fed. br. 23-27, Il. br. 21, that important distinctions exist between emergency assistance and AFDC. Some distinctions are clear on the face of Title IV-A as noted above. Petitioners, however, never presented to the district court these distinctions or any other valid reason to justify relabeling Illinois' program. On the contrary, these arguments appear to be an after-thought to justify a record which the court of appeals characterized as in "blatant disregard of the congressional eligibility requirements. . . ." *Mandley II*, 545 F. 2d at 1064.

Petitioners cannot satisfactorily interpret the express language of Congress in order to achieve the result they seek: unrestricted use of federal funds by the State and a highly arbitrary administration of aid to society's most unfortunate victims. HEW may think it unreasonable that federal funds are allocated to States with "strings" attached, but Congress ties them to this aid. *Helvering* v. *Davis*, 301 U. S. 619, 645 (1937); *Rosado* v. *Wyman*, 397 U. S. 397, 420-423 (1970).

A fundamental principle of equity is applicable here, and the court of appeals applied it: A court of equity will never lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly. The court of appeals correctly held that the express congressional provisions on emergency assistance required Illinois to provide this aid, however designated, through the eligibility requirements of § 406(e).

III.

THE JUDGMENT APPROVED AND ORDERED ENTERED IN MANDLEY II CAN BE UPHELD ON THE BASIS OF THE EQUAL PROTECTION AND STATE LAW CLAIMS PRESSED BELOW.

In addition to the reasons stated in Parts I and II, the final judgment approved and ordered entered in *Mandley II* can be sustained on alternative grounds, on either the equal protection or the State law claims. The district court ruled on the equal protection claim in favor of petitioners and declined to rule on the pendent State claim. Respondents appealed and argued both rulings to the court of appeals in *Mandley I*. That court did not decide them because it held for respondents on the Supremacy Clause claim. Should it be necessary to reach these issues for disposition of this case, respondents respectfully request this Court to decide one or both, as necessary, rather than remand for decision by the courts below.

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[25] 113 Cong. Rec. 36319 (Remarks of Senator Curtis) Had HEW had clear authority to reimburse State payments for emergency needs as AFDC special needs, States would not have needed to ask for § 406(e), as the Senator stated. They would have followed the established route. But the lack of express federal authority was a deterrent to the use of such a route because the risk of spending unmatchable funds is not lightly undertaken by a State.

A. Illinois' Emergency Assistance Program Invidiously Discriminates Against Needy Families with Children in Violation of the Equal Protection Clause Because It Grants Assistance to an Arbitrarily Selected Class and Denies It to All Others Without Relation to a Legitimate State Purpose, and Without Justification by a Compelling Governmental Interest.

Illinois' program creates two classes of families with needy children who are living with a relative, without resources, and for whom aid is necessary to provide living arrangements or to avoid destitution. § 406(e). One class can receive assistance because its need arose from Illinois' selected crisis situations; the other class cannot because its need arose from other crisis situations. Illinois' arbitrary selection of *events* from which destitution threatens does not rationally further the purposes of § 406(e) nor any other legitimate, articulated State interest. *United States Department of Agriculture* v. *Moreno,* 413 U. S. 528 (1973); *Burrell* v. *Norton,* 381 F. Supp. 339 (D. Conn. 1974). In addition, the arbitrarily excluded class is denied or threatened with denial of the fundamental right to life itself. The classification is therefore subject to strict judicial scrutiny, and such scrutiny reveals no compelling State justification.

1. The Discrimination in Illinois' Program Is Arbitrary and Is Not Related to Any Legitimate State Interest.

Congress in the emergency assistance program intended to avoid destitution of needy children by providing immediate assistance in a crisis situation. The Illinois legislature's purpose is equally clear in the Public Aid Code, Ill. Rev. Stat. ch. 23, § 12-8[26] which creates a fund

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[26] Section 12-8 is set out in full in the Appendix to this brief.

> [t]o provide emergency aid to recipients . . . who have failed to receive their grants because of mail box or other thefts, or who are victims of a burnout, eviction, or other circumstances causing privation, in which cases the delays incident to the issuance of grants from appropriations would cause hardship and suffering.

The discrimination in the challenged program, a creation not of any legislative body, but of appointed officials, greatly impairs fulfillment of these legislative purposes. Illinois' program fails to include even the examples specifically enumerated in the statutes and legislative history, *e.g.*, provision of living arrangements in a home, eviction, utility turnoffs, abandonment of children, theft, nonreceipt of grants. The exclusion of a family such as respondent Mrs. Gallman's from benefits solely because her admittedly dire emergency arose from a robbery rather than one of IDPA's four categories defeats the purpose of § 406(e) and § 12-8.

"[W]hen a State decides to alleviate some of the hardships of poverty . . . the manner in which it dispenses benefits is subject to constitutional limitations." *Maher* v. *Roe,* ____ U. S. ____, 53 L. Ed. 2d 484, 492 (1977). "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Baxtrom* v. *Herold,* 383 U. S. 107, 111 (1966).

The governmental interest which Illinois has asserted for its discrimination are unacceptable under the Equal Protection Clause. First, the IDPA deputy director testified that one important consideration in restricting eligibility was the administrative ease gained by enumeration of specific events.[27] Ease of administration can be accomplished in many ways, for example, by allowing all requests by persons whose names begin with A-H, or only children of Caucasian race, or only victims of fires. Such arbitrary means to administrative ease cannot be countenanced under the Equal Protection Clause in light of the goals of § 406(e) and the Illinois Public Aid Code. *Vlandis* v. *Kline*, 412 U. S. 441, 451 (1973); *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972); cf. *Goldberg* v. *Kelly*, 397 U. S. 254, 265-66 (1970).

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[27] "So, we wanted to, No. 1, limit the program to some emergent situations that were common and specific and would leave little doubt once that situation was verified that it did, in fact, constitute an emergent situation which would create a state of fairly— a program that could be administered fairly well." Tr. 366.

Second, the deputy director testified that some types of emergency situations were excluded to prevent possible "abuses" of the program.[28] No substantiation of any abuses was offered. The credibility of a claimant may be at issue in any request for governmental assistance, be it AFDC, emergency assistance, or a tax deduction. Like the taxpayer signing his tax return, the applicant for public assistance files falsely under penalty of perjury and criminal prosecution. Conclusively to presume that all persons experiencing emergencies not enumerated in Illinois' program are abusers and to deprive them of an opportunity to establish the legitimacy of their claims is an unconstitutional presumption. *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974).

Furthermore, Illinois has alternative less onerous tools for the problem of fraudulent claims. See *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528, 535-38 (1973).

a. IDPA can disallow a claim if it disbelieves the client after an attempt at verification.

b. If it later appears that the client has obtained funds improperly, IDPA can recoup from future assistance payments, 45 C. F. R. § 233.20(a)(12), prosecute the person criminally, or file an action for damages. Ill. Rev. Stat. ch. 23, § 11-21.

c. In the case of parental mismanagement of an AFDC grant, IDPA can utilize its protective payment program whereby

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[28] "I said that we should not include any provision in the revised program for replacement of stolen cash since it was extremely difficult to administer such a program due to the fact that it was difficult to verify the incident of robbery as well as extremely difficult to verify the amount of the loss. I felt that it would be open to abusage." Tr. 393-94.

a responsible person is given authority to manage the grant. Ill. Rev. Stat. ch. 23, §§ 4-8 and 4-9; 42 U. S. C. § 606(b)(2).

Saving money appears to be the State's true purpose for its classifications. This interest in the welfare context is not a proper basis for the absolute exclusion of a class whose needs are identical with the class receiving aid. Illinois has other means to reduce costs, as discussed herein and in Part I, *supra*. *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969); cf. *Townsend*, 404 U. S. at 292 n. 8. (1971).

2. The Discrimination in Illinois' Program Impairs the Right to Survive, a Fundamental Right, and Is Not Justified By a Compelling State Interest.

A family denied aid necessary to avoid destitution is deprived of the very right to survive, a fundamental right protected by the Fifth and Fourteenth Amendments. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886). The class of respondents whom Illinois has made ineligible for emergency assistance are threatened with or have experienced deprivation of this right at the hands of government. Such a brutal policy must be justified by a compelling State interest.

This Court recognized in *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969), that arbitrary denial of welfare aid illegally deprives a family of the ability "to obtain the very means to subsist—food, shelter, and other necessities of life." This Court in *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970), also noted that where welfare provides the means for survival the denial of aid makes a family's situation "immediately desperate."

The denial by our government of emergency assistance to children eligible for it is perhaps the cruelest kind of discrimination visited upon a family. Unlike the deprivation to the plaintiffs in *Dandridge* v. *Williams*, 397 U. S. 471 (1970), and *Jefferson* v. *Hackney*, 406 U. S. 535 (1972), which involved solely *reductions* in aid, families in this case have no resources and receive *no* aid. In addition, the consequences to our society may also be grave, as this Court in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), has observed. "[W]elfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." *Id.* at 265. Emergency assistance relieves individual suffering and thus aids society by reducing the instability inherent in destitution. The right to receive emergency assistance is equivalent to the right to survive, which is fundamental in our constitutional system.

Restrictions in the Illinois program cannot stand. They are not justified by a compelling state interest. Under strict judicial scrutiny Illinois' program violates the Equal Protection Clause.

B. Illinois' Program Excludes Persons Made Eligible by the Emergency Assistance Provisions of the Illinois Public Aid Code.

Count I of the amended complaint alleged that the Illinois petitioners' program violates the emergency provisions of the Illinois Public Aid Code, Ill. Rev. Stat. ch. 23, § 12-8, by failing to grant assistance in circumstances specified therein. The district court dismissed this pendent claim stating, "this contention is not cognizable as a pendent action if the principal action fails."

The district court was incorrect. A State law claim is cognizable under the doctrine of pendent jurisdiction, even where the principal action—the claim conferring jurisdiction—fails. *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). Respondents appealed from the dismissal of the pendent claim, but the issue was not reached in the appeals court decision. The district court abused its discretion in declining to decide the pendent claim, *Rosado* v. *Wyman*, 397 U. S. 397, 403-05 (1970); *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 727 (1966).

On the merits of this issue, the IDPA's restrictive emergency assistance program is contrary to the legislative command set out in § 12-8 to provide emergency aid to recipients of AFDC in specified circumstances and in "other circumstances causing privation." To give effect to the language and purpose of the Code, Illinois must provide assistance when delays would cause "privation," "hardship and suffering." This is mandatory. See also, Ill. Rev. Stat., ch. 23, §§ 1-5 and 12-13.

The IDPA's failure to comply with this statutory mandate is clear from the face of the emergency assistance program and from the testimony of IDPA officials at trial. They claimed that § 12-8 is not mandatory but merely an "administrative device" allowing the IDPA use of these funds at its discretion.

Illinois judicial decisions interpreting related provisions of the Code have rejected IDPA's discretion argument. In *Figures* v. *Swank*, 128 Ill. App. 2d 211, 263 N. E. 2d 559 (1970), the IDPA took the position that it had "an absolute, unregulated discretion under the Public Aid Code to pay or not to pay" security deposits authorized by § 12-4.11 of the Code. The argument was not accepted by the Illinois Appellate Court "because a statute or ordinance which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers. [citation omitted]." *Id.* The Illinois Supreme Court in *County of Cook* v. *Ogilvie*, 50 Ill. 2d 379, 280 N. E. 2d 224 (1972), also declined to adopt a similar IDPA argument.

The Illinois petitioners' emergency assistance program is inconsistent with the plain language and purpose of the statute and applicable judicial interpretation. The judgment in this case with respect to AFDC eligible individuals can be sustained on the basis of the State law claim.[29]

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[29] Section 12-8 does not extend emergency assistance to needy families not eligible for AFDC or AFDC/UF. Thus a decision on the equal protection claim would be needed regarding this portion of the class if the State law claim is sustained.

IV.

The Relief Granted in Mandley II Against the Federal and State Petitioners Was Necessary to Secure Their Compliance with the Court's Decisions and to Afford Relief to the Respondent Class.

A. The Court of Appeals Properly Exercised Its Discretion in Ordering Relief Against HEW.

The court of appeals in *Mandley II* properly exercised its authority in ordering HEW to change its administration of the emergency assistance program to conform with § 406(e). The court of appeals had suggested in *Mandley I* that HEW use its rulemaking authority to assist the States in determining the scope of eligibility for emergency assistance.[30] Instead of following that advice or seeking review in this Court, HEW participated in the evasion of *Mandley I*. Consequently, in *Mandley II* the court of appeals concluded that relief against HEW was necessary in order to protect respondents and to provide guidance to Illinois. Accordingly, the court ordered HEW enjoined[31] from approving plans not in conformity with § 406(e) and directed HEW to issue a new conforming regulation.

The Secretary objects because a regulation would have nationwide application. Now that the case is before this Court, a decision on the merits will have that effect. Important here is the appropriateness of the injunction requiring HEW to promulgate a regulation. Had HEW followed the court of appeals' counsel in *Mandley I*, the evasion found to have occurred

on remand might have been avoided. When then-IDPA Director James L. Trainor testified before the Illinois Legislative Advisory Committee on Public Aid on November 17, 1975, about the plan to claim emergency assistance funds as "special assistance", he stated that he intended

> ". . . to suspend the present program and seek to obtain from HEW a definition of an emergency assistance program. Pending that definition . . . , we would create a new program under AFDC and recognize a special need covering essentially the same items that we now cover under what the Court says is an invalid emergency assistance program." App. 85-86.

The Illinois petitioners' desire for guidance from HEW appears to have been genuine and their expectation of prompt response by HEW reasonable (although this does not excuse the illegal "special assistance" plan). The failure of HEW to issue regulations may have contributed to Illinois' efforts to mislead, delay and confuse the district court. On the other hand, forthrightness on HEW's part, either by publishing regulations in compliance with the decision, or by petitioning for certiorari *at the time*, would surely have prevented the lengthy and oppressive chronology which the court of appeals confronted in *Mandley II*.

In this context, the court of appeals exercised restraint in first suggesting to HEW in *Mandley I* that it exercise its rulemaking power in revising its administration of emergency assistance. When the case reached the court of appeals the second time, on this record, the court was amply justified in requiring HEW to comply with its decision by promulgating a regulation. As this Court long ago recognized, "there is inherent in the Court of Equity a jurisdiction . . . to give effect to the policy of the legislature." *Clark* v. *Smith*, 13 Pet. (38 U. S.) 195, 203; *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U. S. 288, 291-92 (1960).

Contrary to the Secretary's statement that his rulemaking authority is wholly discretionary, br. at 39-40, § 1102 of the

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[30] The court stated, "The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rulemaking. [Footnote omitted.] Such rulemaking should aid the States in preparing programs that are in accord with the eligibility criteria set by Congress." 523 F. 2d at 422-23.

[31] In *Mandley II* respondents urged the court of appeals to approve and direct of the entry of the proposed final judgment. Brief of Plaintiffs-Appellants, No. 76-1865 (7th Cir.) at 39.

Act, 42 U. S. C. § 1302, provides that the Secretary *"shall"* issue regulations "necessary to . . . efficient administration". (Emphasis added). This language is mandatory just as it is in the Medicare provisions, 42 U. S. C. § 1395x(v)(1), on which the Court of Appeals for the Second Circuit based its order requiring the Secretary to promulgate regulations in *Kingsbrook Jewish Medical Center* v. *Richardson,* 486 F. 2d 663 (1973). The federal court which sees that the absence of a regulation is causing unlawful expenditure of federal funds, which sees the federal and State agencies engaging in a complicated artifice to avoid its prior decision (hardly "efficient administration"), may, within its mandamus jurisdiction and in exercise of its equitable powers to effect complete relief, order the Secretary to perform its mandatory duty to issue regulations.

The Secretary does not recognize or admit that his own conduct produced this result. He instead claims that injury will ensue to beneficiaries of the program if he is required to promulgate a regulation. Harm will result, the Secretary says, if another State declined to meet the federal eligibility standards and ceased making any emergency assistance payments. A State's participation in the emergency assistance program is, like its participation in AFDC, not mandatory. The decision to participate is largely a political one. Involved are important questions of social welfare policy, such as whether a civilized nation would abandon its own children who because of unfortunate circumstances are without resources, rather than issue them modest emergency aid. See also, *Goldberg* v. *Kelly,* 397 U. S. 254, 264-65 (1970).

Furthermore, the Secretary does not explain how relief against HEW in Illinois could lawfully be severed from its nationwide administration of the Act. The Secretary apparently desires to administer the emergency assistance provisions of the Act in selective fashion among the States. Assuming he abides by *Mandley* in Illinois, it appears he intends to ignore it in other States. He opposes the issuance of a regulation because it will not allow him complete discretion. An agency should not be permitted to enforce the Act throughout the nation in such an arbitrary and disparate fashion. This is particularly true here, where three courts of appeals have ruled that the Secretary's interpretation of § 406(e) is erroneous. HEW should respect these decisions and revise its regulations accordingly.

As a practical matter, proper administration of the multimillion dollar emergency assistance program cannot be accomplished without regulations. The Court of Appeals for the Second Circuit in *Lynch* v. *Philbrook,* 550 F. 2d 793, 795 (1977), which invalidated Vermont's emergency assistance program, observed, "[T]he welfare statutes now rival the Internal Revenue Code in complexity. . . ."

Respondents as intended beneficiaries of emergency assistance under the Act have been injured by HEW's erroneous interpretation and administration of the governing provisions. They have an interest in ensuring that proper regulations are issued and that federal funds are used as Congress intended. *Rosado* v. *Wyman,* 397 U. S. 397 (1970). After the evasions of *Mandley I,* the relief granted was necessary to achieve compliance. The nationwide effect of such relief is incidental and should not deprive respondents of relief found to be otherwise proper and necessary.

B. The Relief the Court of Appeals Approved to Overcome Illinois' Delays in Furnishing Assistance Was Not Objected to Below and Was Proper.

Illinois claims first that the final judgment order requires it to participate in the federally funded emergency assistance program, and second, that it imposes overly burdensome requirements for processing emergency assistance payments. The order does not require Illinois to participate in the federally funded emergency assistance program as these petitioners assert. Final Judgment and Decree, Par. A, App. 147. The fact is, however, Illinois continues to participate in the program and to receive federal funding for it.

After *Mandley I*, Illinois decided not to abandon its illegal emergency assistance program because it found that alternative "totally unacceptable". This decision is reflected in a document entitled Status of Litigation, App. 72-76, filed by Director Trainor with the Illinois Legislative Advisory Committee on Public Aid on October 30, 1975:

> II. ALTERNATIVES
>
> * * *
>
> B. ELIMINATE THE 606(e) PROGRAM. Under the law we are entitled to eliminate the program. . . . The Department, although believing this alternative to be legally acceptable, *finds this alternative totally unacceptable*. . . . (Emphasis added) App. 74.

Illinois did not withdraw from its emergency assistance program in a bona fide way but decided instead to engage in the subterfuge struck down in *Mandley II*.

After *Mandley II* the State petitioners again advanced a claim that they had ceased claiming federal reimbursement for their emergency assistance program. However, they admitted in discovery to (1) claiming and receiving federal reimbursement for the administrative cost of the program; (2) pursuing internal appeals within HEW to recover disallowed claims for reimbursement; and (3) declining to refund to HEW all money illegally obtained.[32] Illinois has yet to find that a complete abandonment of its program is an acceptable alternative.

In response to the second assertion, that the provision of the order requiring it to verify eligibility and authorize payment within 24 hours of a request precludes "the state's need for adequate verification" (Il. br. 33), respondents note, as does Illinois, that the provision complained of contains two exceptions[33] excusing delay. But Illinois suggests, without reference to any evidence in the record, that these protections will not suffice to guard aganist improper payments.

---

[32] Dep. of B. Sticher 46, 87ff. (Jan. 12, 1977); evidentiary exhibits submitted with Reply Memorandum in Support of Plaintiffs' Pending Motions for rule to show cause against the Illinois petitioners, filed Mar. 3, 1977.

Illinois' objection is untimely and without merit. When ordered by the district court to file objections to the proposed final judgment, Illinois did not object to the findings of fact, conclusions of law, or the specific relief ordered concerning delays. It presented no objections in *Mandley II*.[34] The waiver of objections precludes Illinois from raising them here. *Lawn* v. *United States*, 355 U. S. 339, 362 n. 16 (1958).

After the district court found in its November 21, 1974, decision that delays of 7-10 days in delivery of assistance were "not uncommon", it labored for over a year to document the need for expedited procedures and to devise new ones. It gave full consideration to the State's objections to changes the court or respondents suggested. The proposed final judgment incorporated the district court's conclusions and findings on this issue. The order was reviewed and approved by the court of appeals, and it is fully supported by the Act, the legislative history (Part I above) and HEW regulations requiring delivery of payments forthwith. 45 C. F. R. § 233.120 (a)(5).[35]

Moreover, HEW by regulation has relieved states of fear that payments will not be matched because of inadequate verification. HEW regulations specifically exempt emergency assistance payments from the strict AFDC quality control review which imposes financial penalties for improper authorizations of AFDC. 45 C. F. R. §§ 205.40 and 205.41. A State policy which allows delivery of emergency assistance to be stalled in the regular, detailed administrative channels, would conflict with the federal policy.

---

[33] One exception is for delays caused by an applicant and the other allows the State to request a waiver of the 24 hour standard from the applicant. App. 151.

[34] After the final judgment was entered by the district court Illinois moved to amend it, raising the objections presented here. Motion to Alter or Amend Judgment, filed Dec. 10, 1976.

[35] In addition, 45 C. F. R. § 206.10(a)(5) requires medical care and services in emergency situations to be available on a 24 hour, 7 days a week basis. See also 45 C. F. R. §§ 220.51(a)(2), 226.1(a)(7)(iii)(b).

Illinois acknowledges that emergency assistance should be given at an "accelerated pace". Il. br. 33. The record reflects no commitment to accomplish that; it reflects the contrary. The order was just and necessary.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September, 1977.

APPENDIX

Sen. Rep. No. 744, 90th Cong., 1st Sess. 165-166, provides in part:

> (i) *Temporary emergency assistance.*
>
> The (Senate Finance) committee's bill is concerned with several major objectives—to assure needed care for children, to focus maximum effort on self-support by families, and to provide more flexible and appropriate tools to accomplish these objectives. The bill broadens the provisions of protective payments, authorizes vendor payments, provides a work-incentive program, expends foster care for children, and makes day care available where needed to children of working parents. Thus, it materially improves the program in relation to the care and protection of children.
>
> The committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today. When a child is suddenly deprived of his parents by their accidental death or when the agency finds that conditions in home are contrary to the child's welfare, new arrangements and court referrals may have to be made.
>
> To encourage public welfare agencies to move promptly and with maximum effectiveness in such situations, the bill contains an offer to the States of 50-percent participation in emergency assistance payments and the usual 75-percent participation in social services that may be provided. Under the House bill, the time period in which such assistance might be provided is limited to one period of 30 days or less

in any 12-month period. Under the committee bill the period would be 60 days rather than 30. The eligible families involved are those with children under 21 who either are, or have recently been, living with close relatives. The families do not have to be receiving, or eligible upon application to receive, AFDC (although they are generally of the same type), but they must be without a [*sic*] available resource and the payment or service must be necessary in order to meet an immediate need that would not otherwise be met.

Assistance might be in any form—money, medical aid, payment of rent or utilities, orders from food or clothing stores, etc. The provision is broad enough that emergencies can be met in migrant families as well as those meeting residence requirements of the State's AFDC program. Its utilization would be optional with the States.

The committee bill would also authorize emergency assistance for migratory labor families. The latter provision is in addition to those contained in the House bill.

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

* * * * *

§ 233.10 General provisions regarding coverage and eligibility.

(a) State plan requirements. A State plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:

(i) A State shall impose each condition of eligibility required by the Social Security Act; and

(ii) A State may:

(A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage. . . .

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION.

Part IV.

ELIGIBILITY AND PAYMENTS TO INDIVIDUALS

3400-3499 12/10/62

Aid to Families with Dependent Children

* * * * *

3434.2

Temporary Arrangements in Emergencies.—In emergency situations that deprive the child of the care of the parent through whom he has been receiving aid to families with dependent children, Federal participation will be available for payments made to persons acting for relatives specified in this interpretation, because of the necessity which the emergency creates, for a temporary period. Such situations are those in which there has been insufficient time to make any other plan for the child's care or support, including receipt of assistance in his behalf, as in cases of the parent's sudden death, desertion, imprisonment, or commitment to a hospital for the mentally ill. A temporary period is a period limited to that actually necessary to make and carry out plans for the child's continuing care and support.

In operating under this interpretation the State agency may regard the child's eligibility as continuing for a temporary period while plans are being made for him, provided the following criteria are met:

1. Payments on behalf of children for whom no parent or relative is immediately responsible are made only for children who are recipients of aid to families with dependent children at the time the emergency occurs.
2. Payments on a temporary emergency basis are made only for the purpose of carrying out active planning for continuing care of the child.
3. Payments are made only for a period of time necessary to make and carry out plans for the child, including the transfer of responsibility for the child to another agency or community program, or to determine that no further resources exist in that community to meet the child's need.

* * * * *

5233. *Emergency Payee.*

In emergency situations that deprive the child of the care of the parent or relative through whom he has been receiving aid to dependent children, Federal participation is available for a temporary period with respect to payments made to persons acting for relatives with whom a dependent child is or was living, because of the necessity which the emergency creates. Such situations are those in which there has been insufficient time to make any other plan for the child's care and support, including the provision of assistance, as in cases of the relative's sudden death, desertion, imprisonment, or commitment to a hospital for the mentally ill. A temporary period is a period limited to that actually necessary to make and carry out plans for the child's continuing care and support. (See IV-3434.2.)

Federal participation is available with respect to payments made to persons acting in the emergency for parents or relatives with whom a dependent child is or was living, if the following criteria are met:

a. Payments on behalf of children for whom no relative is immediately responsible are made only for children who are recipients of aid to dependent children at the time the emergency occurs.

b. Payments on a temporary emergency basis are made only for the purpose of carrying out active planning for the continuing care of the child.

c. Payments are made only for a period of time necessary to make or carrry out plans for the child, including transfer of responsibility for the child to another agency or community program, or to determine that no further resources exist in the community to meet the child's need. (See IV-3434.2 and 3435.2.)

* * * * *

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION

PART IV.

ELIGIBILITY AND PAYMENTS TO INDIVIDUALS.

5000-5999 *Payments to Individuals* 3/5/51

(This policy was issued in Bureau Circular No. 9 on 10/25/41)

5520. *Principles Governing Federal Participation in Assistance Payments Made Prior to Complete Investigation of Eligibility.*

The following policy statement relating to Federal participation in assistance payments made prior to complete investigation of eligibility was approved by the Social Security Board on October 8, 1941.

* * * * *

3. *Special Procedure for Assistance Payments Prior to Completion of Eligibility Investigation.*

However, during the first months of the operation of the State plan, or in emergency situations thereafter, where the circumstances of an applicant's need warrant special consideration, payments made prior to complete investigation of eligibility, if authorized as categorical assistance prior to payment, may be subject to Federal participation under the conditions specified below.

a. Decision to grant assistance prior to completion of investigation must be made on the basis of facts which indicate presumptive eligibility.

b. Such payments would be made by the State on its own responsibility and cannot be matched with Federal funds until investigation is completed and eligibility established.

c. The award must be authorized in advance of payment as categorical assistance either as old-age assistance, aid to the blind, aid to dependent children, [or aid to the permanently and totally disabled.]

d. Federal participation made on authorization prior to complete investigation and establishment of eligibility cannot be claimed until after the investigation has been completed and eligibility for the period of payment has been established.

e. If the investigation is not completed within a period of 3 months beginning with the month in which payment was started, Federal participation will not be available for payments made prior to the completion of the investigation.

f. The special procedure for assistance payments prior to completion of eligibility investigation must be provided for in the approved State plan.

4. *Administrative Procedures for Assistance Payments Made Prior to Complete Eligibility Determination.*

If payments are made prior to the complete establishment of eligibility, it is necessary for the State agency to install acceptable administrative procedures and methods of recording, identifying, and following up of such cases, to accomplish the following objectives: (a) determination that circumstances warrant the granting of categorical public assistance prior to the completion of investigation; (b) the awarding of categorical public assistance prior to the making of the first payment for which Federal participation is to be claimed; (c) the completion of investigation; (d) the preclusion of claim for Federal participation until the investigation is completed and eligibility determined; (e) the determination that Federal participation may now be claimed; and (f) the prompt cessation of payments as categorical public assistance subject to Federal participation when the recipient is found to be ineligible.

Acceptable administrative procedures in such instances should provide that the evidence of authorization clearly shows, among other things, two administrative decisions: (a) presumptive eligibility and (b) intention to pay categorical public assistance. The wording of the authorizations should affirmatively state both of these decisions. Payments made as a result of such authorizations should be handled separately from regular payments. They should either be recorded on separate assistance rolls, separately columnized on the same assistance roll, or clearly identified on the assistance roll by some symbolic marking and, at the foot of this assistance roll, the total of all such payments and the total of all regular payments summarized so that the amount of the particular assistance roll for which Federal participation should be claimed will be clearly shown. When the investigation is completed and eligibility is established, a confirming authorization should be issued changing the status of the award to that of a regular award. During the interim between the authorization to pay categorical public assistance and the completion of investigation, a separate record of such cases should be maintained for the purposes of follow-up and subsequent determination of claim for Federal funds if the investigation results in the establishment of complete eligibility.

The established procedures for reporting claims for Federal participation through Quarterly Statements of Expenditures are adequate to cover the reporting of payments made prior to complete investigation of eligibility, if the investigation is completed and confirming authorization of eligibility is issued during the quarter in which the payments are made. Payments in such case will be reported as current expenditures in the same manner as regular payments.

> If the investigation of eligibility is not completed and confirming authorization of eligibility is not issued *within the quarter in which the payments are made*, such payments will not be reported for purposes of Federal participation in the Quarterly Statement of Expenditures for the quarter in which they are made. Such payments *for a prior quarter or quarters* will be reported in Schedule B "Adjustment of Assistance Expenditures for Prior Periods" in the Quarterly Statement of Expenditures covering the quarter in which the investigation has been completed and confirming authorization of eligibility issued.

ILL. REV. STAT. CH. 23, § 12-8.

§ 12-8. *Public Assistance Emergency Revolving Fund—Uses.* The Public Assistance Emergency Revolving Fund, established by Act approved July 8, 1955 and held by the State Treasurer as ex-officio custodian outside of the State Treasury, shall be used for the following purposes:

1. To provide immediate financial aid to applicants in acute need who have been determined eligible for aid under Articles III, IV, or V [AFDC, Aid to Aged, Blind and Disabled, and Medical Assistance, respectively].
2. To provide emergency aid to recipients under said Articles who have failed to receive their grants because of mail box or other thefts, or who are victims of a burnout, eviction, or other circumstances causing privation, in which cases the delays incident to the issuance of grants from appropriations would cause hardship and suffering.
3. To provide emergency aid for transportation, meals and lodging to applicants who are referred to cities other than where they reside for physical examinations to establish blindness or disability, or to determine the incapacity of the parent of a dependent child.
4. To provide emergency transportation expense allowances to recipients engaged in vocational training and rehabilitation projects.

5. To establish petty cash funds to meet immediate needs, such as making payment on postage due and the purchase of incidental and inexpensive commodities necessary for immediate needs where the vendor insists upon a cash transaction.
6. To establish an account for other emergency administrative expenses as determined by the Illinois Department to be necessary for the effective administration of this Code.

Disbursements from the Public Assistance Emergency Revolving Fund shall be made by the Treasurer upon the order of the Illinois Department.

Expenditures from the Public Assistance Emergency Revolving Fund shall be for purposes which are properly chargeable to appropriations made to the Illinois Department. The Illinois Department shall reimburse the Public Assistance Emergency Revolving Fund by warrants issued by the Auditor of Public Accounts on the appropriation or appropriations which are so chargeable, payable to the Revolving Fund. 1967, April 11, Laws 1967, p. 122, § 12-8.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, et al.,

Petitioners,

vs.

VENUS MANDLEY, et al.,

Respondents.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,

Petitioner,

vs.

VENUS MANDLEY, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE STATE PETITIONERS

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE STATE PETITIONERS

ARGUMENT

I.

THE STATE OF ILLINOIS MAY LAWFULLY PROVIDE FOR THE SPECIAL AND EMERGENCY NEEDS OF AFDC RECIPIENTS WITHIN THE MEANING OF 42 U.S.C. 606(b) AS FUNDED VIA 42 U.S.C. § 603(a)(1).

Respondents attempt to paint a sinister picture of Illinois' actions in this case, in which the State, with HEW's blessing, "devised" a method to avoid the Seventh Circuit's decision in *Mandley I* (br., 31). On the contrary, the State merely invoked a pre-existing option clearly authorized by federal law.

Under the AFDC program, the State has always had essentially unfettered discretion to determine its standard of need and to choose those items which will be considered in setting that standard. Both emergency and non-emergency needs may be included within that standard, as has long been recognized by HEW. *See,* e.g., 45 C.F.R. § 233.20 (a)(2)(v); Department of Health, Education, and Welfare, *Handbook of Public Assistance Administration, Part IV,* Section 3131(3) (February 23, 1966). While respondents contend that most State special needs programs deal with dietary needs, transportation needs, etc., there is nothing in either the Social Security Act or its legislative history which demonstrates a Congressional intent to exclude emergency need items from a state's standard of need.

Respondents maintain that Congress, in enacting § 406 (e), did not authorize alternative provisions for emergency assistance (br., 35). Clearly, such authorization is not needed, for the States always have been authorized to

include special and emergency need items within their AFDC plans. Alternately, respondents argue that any authorization for the meeting of special needs through the § 406(b) AFDC plan was superseded by enactment of the § 406(e) emergency assistance program. However, since § 406(e) was designed to provide benefits to children not eligible for AFDC, there is no reason why the statute would have superseded a valid component of the AFDC program, a related *yet separate* program. Further, the Supreme Court has indicated that it will not lightly presume that Congress intended to preempt existing legislation. In refuting an argument that Congressional enactment of the Work Incentive Program preempted New York work rules, the Supreme Court stated in *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405,413, 37 L. Ed. 2d 688 (1973) that:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is clear manifestation of intention to do so.

There is no manifestation in either § 406(e) or its legislative history that Congress intended to rescind its previous authorization allowing states to provide for the special needs of AFDC recipients under § 406(b).

Respondents recognize that clear and significant distinctions exist between the § 406(e) program and the program for special needs authorized under § 406(b). In view of this concession, it is difficult to understand their characterization of the Illinois program as a "subterfuge" (br., 48). Rather, the Illinois special assistance program created pursuant to § 406(b) and funded via 403(a)(1) was clearly authorized and should be upheld.

II.

THE STATE OF ILLINOIS MAY MAINTAIN AN EMERGENCY ASSISTANCE PROGRAM UNDER 42 U.S.C. § 606(e) WHICH DOES NOT PROVIDE RELIEF FROM ALL TYPES OF DESTITUTION AND FOR ALL NEEDY FAMILIES WITH CHILDREN.

In the main, respondents' position is based on *King* v. *Smith,* 392 U.S. 309, 20 L. Ed. 2d 1118 (1968); *Townsend* v. *Swank,* 404 U.S. 282, 30 L. Ed. 2d 448 (1971), and their successor cases which concerned State AFDC programs. Those cases held that once a federal eligibility standard is established, states must pay AFDC benefits to all eligible persons absent a showing that those persons were not covered or that such coverage was optional with the states. However, the holdings were grounded on § 402 (a)(10) which requires that "*. . . aid to families with dependent children* shall be furnished . . . to all eligible individuals." 42 U.S.C. § 602(a)(10) (emphasis added). However, since the instant case concerned the emergency assistance program, a program related to yet separate from AFDC, the language of § 402(a)(10) demonstrates that both that subsection and the *King* line of cases are inapplicable. *See Williams* v. *Wohlgemuth,* 540 F. 2d 163 (3d Cir. 1976).

Respondents argue that notwithstanding the clear wording of § 402(a)(10), Congress nonetheless impliedly intended that the subsection would also govern the § 406(e) emergency assistance program. According to respondents, the language of § 402 was not amended to specifically include emergency assistance because the § 406(e) program was optional. Thus, once a state opted to participate, § 402(a)(10) would control any § 406(e) plan. Respondents' contention might carry weight if all subsections in § 402(a) pertained merely to "aid to families with dependent children." However, a number of subsections are much broader in scope than § 402(a)(10). *See,* e.g., 42 U.S.C. § 602(a)(1), (2), (3) and (5). Furthermore, in 1968, the year in which the § 406(e) program was established, Congress amended § 402(a) in fifteen separate places. *See* 42 U.S.C.A. § 602, *Legislative History.* Since § 402(a)(10) was not amended to include the emergency assistance program within its scope, it is clear that Congress did not intend that subsection to govern a State's emergency assistance program.

45 C.F.R. § 233.10(a)(1)(i) and (ii), relied on by both respondents and the court of appeals, provides no support for their position. That section, the so-called "Townsend regulation," was designed to effectuate the Supreme Court's decisions in *King* and *Townsend* — decisions which did not pertain to the emergency assistance program. Moreover, the clear purpose of that section is to prohibit states from defining eligibility more narrowly than is provided by the Act. However, respondents erroneously contend that the language of § 406(e) sets forth a definition of eligibility for emergency assistance.

At page 19 of their brief, respondents paraphrase the alleged eligibility requirements of § 406(e). However, in deviating from the wording of § 406(e), respondents distort the meaning and purpose of the statute. The essential wording shows that emergency assistance may be provided, "*but only where*" the child is without available resources, the assistance is necessary to avoid destitution or provide living arrangements, and the need did not arise from a refusal to accept work or work training.[1] 42 U.S.C.

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[1] The "but only where" language is conspicuously absent from respondents' alleged eligibility definition.

§ 606(e)(1) (emphasis added). This language is critical, for it demonstrates that Congress envisioned the above provisions as placing a limitation on the scope of emergency assistance programs designed by the States, and not as establishing a standard of eligibility. Thus, Congress did not intend that a State which opts into the § 406(e) program must provide emergency assistance to anyone who could fit within the broad perameters of the statutory language.

This conclusion is further supported by the presence of the term "necessary to avoid destitution." Readily apparent is the broad scope of that phrase. Congress did not define that term in the statute, and its failure to do so supports petitioners' view that the term was not meant to establish a standard of eligibility.[2] Rather, the term was left undefined in order to give each state leeway in providing its own interpretation for purposes of the emergency assistance program.

Nothing in the legislative history of § 406(e) reveals that states were required to provide assistance to cover the entire gamut of emergencies for all needy persons. On the contrary, the history demonstrates that Congress created a program which would give participating states flexibility in dealing with emergency situations. S. Rep. 744, 90th Cong. 1st Sess., (1967) U.S. Code Cong. & Adm. News, v. 2, p. 3002-03.

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[2] As the court of appeals was forced to concede, it was unable to define the term "necessary to avoid destitution" (A. 43). It is indeed puzzling that the court, without defining that alleged eligibility requirement, could somehow find that the Illinois program was inconsistent with § 406(e).

The court of appeals decision, by requiring states to cover all emergency needs of all needy people, creates severe problems for Illinois and other states. Respondents suggest at pages 26-27 that such is not the case, but their reasoning is faulty. Respondents' suggestion that Illinois need not participate in the emergency assistance program, while technically correct, is unhelpful. Illinois recognizes the problems of AFDC recipients suddenly faced with emergency needs, and respondents' suggestion does nothing to solve those problems.

Second, respondents suggest that Illinois, in operating a pre-1973 program "which nearly met the eligibility standard" (br. 27), spent only 0.14 percent of its budget on emergency assistance. However, as respondents noted in their statement of facts (p. 3) the pre-1973 program essentially covered only AFDC recipients. Thus, if previous funding levels were maintained, an extension of an emergency assistance program to cover persons not eligible for AFDC would drastically increase the budget.

Finally, respondents argue, based on Illinois population and the 1972 projected federal cost of the program, that Illinois would receive twice as much federal funding as it spent in 1972, prior to the restriction in the scope of the program. As previously noted, however, the 1972 Illinois program was much more restrictive than the program envisioned by the court of appeals. Moreover, respondents erroneously compute the federal share to all states as $70 million. In actuality, the federal share would be only half that amount. In addition, respondents erroneously assume that since Illinois has five percent of the nation's population, it would receive five percent of available federal funds. However, because "standards of need" vary from state to state, the amount paid to each state will not bear a proportional relationship to the state's population percentage. Thus, notwithstanding respondents' assertions to the contrary, the court of appeals' erroneous interpretation of § 406(e) has placed Illinois in a very real dilemma.

III.

THE ORDER APPROVED IN *MANDLEY II* SHOULD NOT BE AFFIRMED ON THE BASIS OF THE EQUAL PROTECTION CLAIM RAISED BY RESPONDENTS.

Respondents urge that the order entered at the express direction of the seventh circuit in *Mandley II* can be sustained on equal protection grounds. Essentially, that order effectuated the court of appeals' *Mandley I* decision respecting the scope of § 406(e) programs. Respondents note that while the equal protection issue was decided adversely to them by the district court, the issue was not decided by the seventh circuit in *Mandley I.*

However, as previously noted, after *Mandley I* Illinois terminated its emergency assistance program under § 406 (e) and instead created a program to meet the special or emergency needs of AFDC recipients through the § 406(b) AFDC program, as funded via § 403(a)(1). Indeed, the central issue before this Court is whether Illinois can lawfully maintain this new plan as part of its AFDC program.

This Court has held that it will not decide issues not aired in the lower courts. *Burns* v. *Alcala,* 420 U.S. 575, 587, 43 L. Ed. 2d 469, 478 (1975). Furthermore, it is well settled that this Court will not resolve constitutional questions where such resolution is unnecessary to the final disposition of the cause. *See Youakim* v. *Miller,* 425 U.S. 231, 236, 47 L. Ed. 2d 701, 706-07 (1976). Should the Court uphold petitioner's position respecting the validity of the Illinois special assistance program established under § 406(b), there is simply no need to consider respondent's constitutional argument respecting Illinois' terminated § 406(e) emergency assistance program. Furthermore, since respondents did not raise a constitutional challenge to the validity of Illinois' present program notwithstanding their opportunity to do so, their argument should not be viewed as a challenge to the Illinois "special assistance" program.

However, assuming for argument's sake that this Court desires to reach the equal protection challenge raised by respondents, it is respectfully submitted that their claim is without merit.

This Court has most recently reiterated the mode of analysis for equal protection challenges to state welfare legislation. In *Maher* v. *Roe,* —— U.S. ——, 53 L. Ed. 2d 484, 492 (1977) the Court stated:

> The basic framework of analysis of such a claim is well-settled:
>
> "We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination . . . ." San Antonio School District v. Rodriguez, 411 US 1, 17, 36 L Ed 2d 16, 93 S Ct 1278 (1973).

While respondents do not argue that they are members of an inherently suspect class, they contend that the welfare scheme impinges on a fundamental right, i.e., the right to life itself.

Illinois has never attempted to deprive respondents of their right to survive. Rather, Illinois, in previously operating an emergency assistance program under § 406(e), merely determined that emergency welfare payments should be made only in response to certain emergency situations. While it can be argued that payments to persons enmeshed in other emergencies would be beneficial, it cannot be argued that Illinois, in failing to make those payments, has impinged on anyone's right to survive.

Maher v. *Roe, supra,* is most instructive in this regard. In *Maher,* plaintiffs challenged on equal protection grounds a Connecticut welfare regulation which limited state funding for first trimester abortions to those abortions that were medically necessary. Plaintiffs contended that since Connecticut provided funds for childbirth but did not provide funding for non-therapeutic abortions, the regulation effectively violated each woman's right to have an abortion. In distinguishing prior abortion decisions, the Court found that in each case the states involved had imposed unduly burdensome restrictions on a woman's freedom to determine whether to terminate her pregnancy. —— U.S. ——, 53 L. Ed. 2d 484, 494. In contrast, while Connecticut made funding available for childbirth, its decision to not provide funding for abortions did not impose any obstacles blocking a woman's free choice respecting abortions. *Id.* at 494-95. Similarly, Illinois previously provided emergency assistance to meet only certain emergency needs. Its decision to not grant emergency assistance for other emergency situation in no way impinged on other persons. Thus, Illinois former emergency assistance program did not violate respondents' right to survive.

Though not articulated, respondents essentially maintain that they have a fundamental right to welfare benefits which was violated by the Illinois emergency assistance program. However, the Supreme Court has never found such a fundamental right to exist. *Dandridge* v. *Williams,* 397 U.S. 471, 25 L. Ed. 2d 491 (1970); *Jefferson* v. *Hackney,* 406 U.S. 535, 32 L. Ed. 2d 285 (1972); *Maher* v. *Roe,* —— U.S. ——, 53 L. Ed. 2d 484 (1977). Respondents attempt to distinguish *Dandridge* and *Jefferson* on the ground that those cases merely involved reductions of benefits as opposed to total deprivations of welfare payments. However, *Dandridge* and *Jefferson* are broad enough to cover the instant case. Indeed, while the Court noted in *Dandridge* that "[t]he administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings," the Court nonetheless held that it should apply the traditional equal protection standard in determining whether a state welfare scheme as consistent with the mandate of the fourteenth amendment. 397 U.S. 471, 502, 25 L. Ed. 2d 491, 502. This test should likewise be applied to the welfare scheme under challenge here. *See also Black* v. *Beame,* 550 F. 2d 815 (2d Cir. 1977).

The Illinois emergency assistance program established under § 406(e) was divided into four components:

1. The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable (example: fire, condemnation).
2. A court ordered eviction occurs for reasons other than the recipient's failure to pay rent.
3. The AFDC family is potentially homeless due to damage to a portion of the building.
4. The AFDC applicant, determined presumptively eligible for AFDC, is in emergent need of cloth-

> ing and/or household furnishings and equipment. (Emergent food and rent can also be authorized by disbursing order at the time the applicant is determined presumptively eligible as provided in this paragraph. Any amount thus authorized may not exceed the amount calculated as the applicant's first month's payment, and will be deducted from the applicant's first month's payment.)

Respondents do not argue that the program did not apply to all AFDC recipients. Respondents contend that the welfare scheme violated the equal protection clause because it authorized aid for AFDC recopients having certain emergency needs, yet did not provide aid for AFDC recipients who had other emergency needs.

The regular AFDC program created pursuant to § 406(b) provides aid for needy families with dependent children so that they might meet their normal living expenses, e.g., expenses for food, clothing, and shelter. However, when emergencies arise, the money provided by the regular program is often, if not always, insufficient to meet the exigent needs of AFDC recipients. Thus, the Illinois emergency assistance program under § 406(e) was designed to provide financial assistance to meet expenses which are not budgeted into a recipient's grant.

In this regard, the emergency assistance program covered a very wide range of common emergency situations. AFDC recipients forced to suddenly find new shelter due to condemnation of their premises or damage to their building caused by catastrophe could obtain emergency aid. Similarly, AFDC recipients evicted by court order could also obtain emergency relief.[3] Moreover, presumptively

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[3] Not included are court-ordered evictions due to an AFDC recipient's failure to pay rent. However, rent money

AFDC-eligible persons in emergency need of clothing and household furnishings and equipment could obtain assistance under the former § 406(e) program. Thus, the program helped insure that both AFDC and potential AFDC recipient could secure basic necessities of life.

The types of possible emergency situations facing AFDC recipients are perhaps too numerous to count. Given Illinois' limited public aid resources, the State had to determine whether "to support some families adequately and others less adequately, or not to give sufficient support to any family." *Dandridge* v. *Williams,* 397 U.S. 471, 479, 25 L. Ed. 2d 491, 499 (1970). Because the State chose the former alternative, Illinois did not provide emergency assistance to meet all types of emergency needs Thus, not included in the program were those emergency needs which in general could not be verified or which, by inclusion, would cause the program to be subjected to abuse. However, since the Illinois emergency assistance program was designed to meet the bona fide emergency needs of AFDC recipients, the exclusion is rationally related to the purpose of the statute and is consistent with the State's desire to most productively use its finite welfare funds. Thus, the district court upheld the validity of the differential treatment accorded by the former Illinois program. While the Illinois program did not alleviate all emergency situations, Illinois was not required by the fourteenth amendment to "choose between attacking every aspect of a problem or not attacking the problem at all." Id. at 486-87, 25 L. Ed. 2d 491, 503 (1970).

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is computed into the recipient's regular grant. Since emergency needs are those for which no funds are normally provided, eviction for failure to pay rent does not fit within the category of emergencies.

Respondents cite *Jimenez* v. *Weinberger,* 417 U.S. 628, 41 L. Ed. 2d 363 (1974) for the proposition that Illinois could not provide emergency assistance benefits only to those verifiable emergency situations. The federal statute under attack in *Jimenez* severely restricted the ability of an illegitimate child to obtain benefits from a parent's disability insurance. Thus, *Jimenez* was concerned with an individuals eligibility to receive Social Security benefits. However, in the instant case, there was no question that all AFDC recipients were eligible to receive emergency assistance. The distinction which was created by the Illinois program did not deal with the question of eligibility for the program, but rather dealt wth the content of the program, i.e., which emergent needs would be covered.

Respondents also contend that there are less onerous methods of achieving the result which Illinois desires. However, so long as the classification made by a statute is rationally related to the statute's purpose, the fact that less severe alternatives might exist is irrelevant.

It should also be noted that while the Illinois' program did not provide aid in all emergency situations, other portions of the State's welfare scheme operated to assist a needy AFDC recipient. For example, since Illinois participates in the federal food stamp program, persons in emergency need of money for food could obtain food stamps in order to meet their need. Moreover, if an AFDC recipient's regular check was lost or stolen, he could obtain a replacement via the petitioners' Warrant Control Program. (Tr. 391-99). In light of petitioners' attempts to provide other mechanisms to aid respondents, petitioners emergency assistance program did not run afoul of the fourteenth amendment. *Macias* v. *Finch,* 324 F. Supp. 1252, 1260 (N.D. Cal. 1970) *aff'd sub nom. Macias* v. *Richardson,* 400 U.S. 913, 27 L. Ed. 2d 153 (1970).

It can be argued that Illinois' former emergency assistance program did not constitute the best approach to the problems facing needy persons in Illinois because the program did not cover all emergency need situations. In this regard, *Dandridge* v. *Williams,* 397 U.S. 471, 485, 487, 25 L. Ed. 2d 491, 501-02, 503 (1970) is particularly appropriate:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 US 61, 78, 55 L Ed 369, 377, 31 S Ct 337. "The problems of government are practical ones and may justify, if they do not require, rought accmmodations—illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 US 61, 69-70, 57 L Ed 730, 734, 33 S Ct 441.
>
> * * *
>
> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients Cf. Steward Mach. Co. v. Davis, 301 US 548, 584-585, 81 L Ed 1279, 1289, 1290, 57 S Ct 883, 109 ALR 1293; Helvering v. Davis, 301 US 619, 644, 81 L Ed 1307, 1316, 57 S Ct 904, 109 ALR 1319.

Thus, it is respectfully submitted that respondents' equal protection challenge is without merit.

IV.

THIS COURT SHOULD NOT RULE ON RESPONDENTS' STATE LAW CLAIM.

Respondents urge this Court to rule on their claims based on the Illinois Public Aid Code. However, the district court declined to rule on respondents' state law claim, and the court of appeals likewise did not decide the issue. Since the claim has not been previously litigated in the lower courts, this Court should not rule on respondents' state law claim. *Youakim* v. *Miller,* 425 U.S. 231, 47 L. Ed. 2d 701 (1976); *Burns* v. *Alcala,* 420 U.S. 575, 43 L. Ed. 2d 469 (1975).

V.

THE RELIEF APPROVED BY THE COURT OF APPEALS IN *MANDLEY II* AGAINST THE STATE PETITIONERS IS IMPROPER.

In attempting to uphold the relief approved in *Mandley II,* respondents claim that a passage from a document in the Record demonstrates that Illinois continues to participate in the § 406(e) emergency assistance program (br., 47-48). However, the very next paragraph in that document totally contradicts respondents' theory. As part of a status report on the *Mandley* litigation which petitioners filed with the Illinois Legislative Advisory Committee on Public Aid, various courses of action were suggested in light of the *Mandley I* decision. One such alternative was to:

> C. Eliminate 606(e) Program and Create a Program for Meeting Emergent Burnout Cases to be Funded Under Section 602 and Section 603.
>
> *This is the alternative recommended by the Department.* IDPA proposes to create a special need item (for which it would apply to the Federal Government for reimbursement at the usual 50% rate) as part of the regular AFDC program. Such a program would not cost the Department significantly more than the present program as the only increase in expenditures would be for people who were burned out more than once in a 12-month period. (Payments for two emergencies to the same receiving unit within a 12-month period are not reimbursable under the Section 606(e) provisions.) Should for some reason the Federal Government protest the creation of such a special need item, the situation would have to be reevaluated. At the present time we believe the Federal Government would approve funding such a special need program. (A. 75, emphasis added).

In fact, the Department chose this alternative, and it created an even broader program than was described. The language emphasized by respondents merely reflected the prevailing attitude that some type of special assistance was necessary in Illinois. However, the document cannot be fairly read as demonstrating that Illinois still participates in a § 406(e) emergency assistance program.

Furthermore, as noted by petitioners in their Motion to Alter or Amend Judgment filed in the district court,[4] the

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[4] The proposed final judgment order eventually approved by the seventh circuit was filed in the district court on November 26, 1975 (A. 46). That order dealt with the requirements of § 406(e) and of state plans implementing that subsection. On December 1, 1975, state petitioners filed a motion to dismiss in the district court on the ground that Illinois would no longer operate a § 406(e) emergency assistance program (A. 59). In their objections filed in the district court on January 21, 1976, petitioners objected to

provision of the order requiring Illinois to provide emergency assistance within twenty-four hours of a request for aid will lead to serious abuses in the program. Such a stringent time limitation is simply not required either by the Social Security Act or HEW regulations, and the requirement by far exceeds that which is necessary to properly effectuate the emergency assistance program, should Illinois opt to provide a § 406(e) plan.

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the scope of relief ordered in paragraph C (which set forth the time limitations in question) on the ground that Illinois would no longer participate in the emergency assistance program (A. 100). Given the State's decision, more elaborate objections were simply not necessary at that time. Furthermore, since the issue in *Mandley II* concerned the validity of Illinois' new special assistance program, it is unreasonable to assume, as respondents now do, that objections to the proposed order should have been raised in *Mandley II*. After the seventh circuit, acting *sua sponte,* approved the proposed final judgment order, petitioners filed their motion in the district court. In view of the circumstances, petitioners have not waived their objections to the order. *Lawn* v. *United States,* 355 U.S. 339, 2 L. Ed. 2d 321 (1958), which presents a different factual situation, is clearly distinguishable.

CONCLUSION

For the foregoing reasons, Arthur F. Quern, Director of the Illinois Department of Public Aid, et al., state petitioners, respectfully urge this Honorable Court to reverse the order entered by the court of appeals on November 23, 1976, and to affirm the order entered by the district court on July 12, 1976 dismissing the cause as moot.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, Acting Director, ILLINOIS DEPARTMENT OF PUBLIC AID, *et al.*,
Petitioners,

v.

VENUS MANDLEY, Individually and on Behalf of All Others Similarly Situated,
Respondents.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Petitioner,

v.

VENUS MANDLEY, Individually and on Behalf of All Others Similarly Situated,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

Interest of the Amicus

The State of New Jersey is filing a separate *amicus curiae* brief in this matter because its outcome will unquestionably affect the State's ability, legislatively and administratively, to fashion within reasonable fiscal limits a public assistance program providing emergency relief in a manner most responsive to public needs. The decision of the United States Court of Appeals for the Seventh Circuit, which construed the Social Security Act to require an emergency assistance program far broader in coverage than that envisioned by Congress, promises to substantially undermine the necessary flexibility a state must have to fashion such assistance programs attuned to the immediate local climate. This is particularly true with respect to the nationwide relief ordered by the court, the most immediate effect of which could be the revocation by the Secretary of Health, Education and Welfare of his approval of New Jersey's emergency assistance program and the consequent loss of federal matching funds which are so vital to the continued operation of public assistance in the State.

Although New Jersey's limited fiscal resources do not permit it to provide every desirable public assistance service, the State has nonetheless fashioned an extensive and wide-ranging welfare program. This program, of which emergency assistance is an integral part, reflects difficult choices made by the duly elected representatives of the people in terms of evaluating and balancing the complex and competing needs of the poor. The choices made by the State respecting emergency assistance grants are difficult in that, within the limits of a fixed appropriation for that purpose, it must attempt to provide a meaningful amount of assistance to as broad a class of recipients as possible. It is precisely this dilemma, faced

by every state's elected officials in attempting to fashion responsive and remedial welfare assistance programs, that has moved the Court so many times to reaffirm and uphold the broad flexibility of the states to allocate their resources for social programs.

New Jersey has earmarked specified State and federal funds for emergency assistance to meet the most compelling needs of its citizens. Rather than utilizing these limited funds to provide a token payment in every conceivable emergency circumstance, the State has decided by regulation (N.J.A.C. 10:82-5.12) to provide meaningful assistance to those who find themselves facing imminent homelessness due to emergency circumstances. Shelter, food, and clothing are provided, as necessary, to people who suddenly find themselves in such a desperate situation.

This emergency assistance program, however, has come under legal challenge in the courts as inconsistent with the Social Security Act. Indeed, lawsuits challenging New Jersey's emergency assistance program, and raising issues similar to those presented in this case, are currently pending in the federal courts. *Gonzalez* v. *Young*, 418 F.Supp. 566 (D.N.J. 1976) vacated and remanded, —— F.2d—— (3d Cir. July 15, 1977); *Wise* v. *Klein*, Dkt. No. 76-274 (D.N.J., filed February 17, 1976). As already mentioned, New Jersey's program is also subject to possible challenge by the Secretary of Health, Education and Welfare as a result of the Seventh Circuit's decision in the instant matter. Thus, any decision by the Court in the present case will substantially, if not conclusively, impact on the outcome of the *Gonzalez* and *Wise* matters, future actions of the Secretary, and the validity of N.J.A.C. 10:82-5.12.

An affirmance of the court of appeals' decision may result in the imposition upon New Jersey by judicial decree of an unduly broad welfare program which the State has determined, after considering the competing local concerns and needs, is not at the present time an appropriate allocation of available revenue resources. Alternatively, an affirmance may result in the State's withdrawal from the emergency assistance program due to its inability to fund a program of significantly broadened eligibility. Thus, it is clear that the State of New Jersey has a vital interest in preserving the authority of its Legislature, consistent with the Social Security Act, to fashion provisions for emergency assistance which are in accord with its views of proper allocation of State resources among the competing interests of the poor.

ARGUMENT

Section 406(e) of the Social Security Act does not require states participating in the program of "emergency assistance to needy families with children" to furnish assistance to all needy families with children to whatever extent is necessary to avoid destitution.

In 1968, Congress amended § 403 of the Social Security Act for the purpose of encouraging the states to institute plans providing emergency assistance to their citizens by pledging the following financial incentives:

> "(a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—
>
> "(5) in the case of any State, an amount equal to 50 per centum of the total amount expended under the State plan during such quarter as emergency assistance to needy families with children" 42 U.S.C. § 603(a)(5).

The definition of "emergency assistance to needy families with children," for which Congress has offered 50% federal funding, is set forth in § 406(e) of the Social Security Act, 42 U.S.C. § 606(e):

> "(e)(1) The term 'emergency assistance to needy families with children' means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—
>
> "(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and
>
> "(B) such services as may be specified by the Secretary;

> "but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.
>
> "(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate."

The State of New Jersey submits that this statute contains no mandatory eligibility criteria binding upon all states which participate in § 406(e) programs, but that it merely delineates the outer parameters within which federal moneys may be employed by the states to fund their individually tailored programs.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring). The statute begins with the phrase, "The term 'emergency assistance to needy families with children' means any of the following. . . ." It is at once apparent that this is merely a definitional section, designed to be read with § 403(a)(5). Section 406(e)(1) is not in nature or tone directory since it does not mandate the performance of any act or the undertaking of any duty. The statute merely permits a term of art, "emergency assistance to needy families with children," to be applied, for purposes of § 403(a)(5), to "any," but not necessarily "all," "of the following" items.

"Any of the following" refers clearly to § 406(e)(1)(A): "money payments, payments in kind, or such other payments as the State agency may specify. . . ." Participating states are thus not obligated to provide any specific kinds of emergency relief but may choose, each in its own discretion, the type[s] of aid to be made available. This area of state discretion has been recognized even by the decisions in *Williams* v. *Wohlgemuth,* 540 F.2d 163, 169 (3d Cir. 1976) and *Mandley* v. *Trainor,* 523 F.2d 415, 420 (7th Cir. 1975). Surely this Congressional delegation of discretion to the states respecting the types of assistance to be made available is evidence that Congress never intended that participating states must provide emergency assistance to avoid the destitution of all individuals who, due to an emergency, are "without resources." It makes little sense to mandate such a broad base of eligibility coverage, while at the same time permitting state discretion as to the types of aid to be made available. Under such an arrangement, it is not inconceivable that an individual "eligible" for assistance pursuant to the presumably binding criteria would nevertheless remain unaided simply because the state had not chosen to make available as part of its plan precisely the type of assistance necessary to remedy the emergent situation. Congress undoubtedly never intended such an anomalous result.

Other than the decision as to the kinds of aid to offer, § 406(e)(1) entrusts other important elements of emergency assistance to state discretion. Thus, states may determine the period of time during which assistance is available ("not in excess of 30 days in any 12-month period"), and whether or not migrant workers are to be included. *Williams* v. *Wohlgemuth, supra,* 540 F.2d at 169; *Mandley* v. *Trainor, supra,* 523 F.2d at 420.

One additional area of state discretion goes to the heart of the issue of eligibility determination. Section 406(e)(1) assistance is available "in the case of a needy child under the age of 21" living in the home of any relative specified in § 406(a)(1). It has long been settled that the inquiry as to who is a "needy child" lies solely within the realm of the states, which have "undisputed power to set the level of benefits and the standard of need" in programs under Title IV-A of the Social Security Act.* *Dandridge* v. *Williams,* 397 U.S. 471, 478 (1970); *King* v. *Smith,* 392 U.S. 309, 334 (1968). This Court has previously noted that the legislative history of the Social Security Act makes it clear that states have the power to determine who is a "needy child" within the context of § 406(a), *King* v. *Smith, supra,* 392 U.S. at 318, n. 14, and there is no reason why this power is not applicable to a § 406(e) "needy child" as well. The fact that Congress permits the states to determine who is a "needy child," what kind of emergency assistance should be made available to such a child, and for how long a period it should be available, strongly indicates an intention to permit the states to fashion emergency assistance programs to fit their individual needs within broad federal guidelines.

This conclusion is buttressed, rather than undermined, by that portion of § 406(e)(1) which must serve as the focus of the Court's analysis. That portion provides, in essence, that "emergency assistance" means state-designated relief for a state-defined "needy child . . . but only where [1] such child is without available resources," [2] the assistance is "necessary to avoid destitution of such child" or to provide living arrangements for the child, and [3] the destitution is not attributable to a refusal, without good cause, by the child or his relative to accept employment or training. It is immediately apparent that this portion does not affirmatively direct that every individual who satisfies each of the three enumerated criteria shall be eligible for emergency assistance. To the contrary, this portion of the statute is prefaced by words of limitation, the intent of which is not to set forth broad eligibility criteria against which the applications of individuals for assistance will be measured but to delineate the conditions under which federal matching funds will be made available pursuant to § 403(a)(5) and its companion definitional counterpart, § 406(e). In effect, then, this portion of the statute means that § 403(a)(5) funds are available to the states, who may disburse them as emergency assistance *but only where* necessary to avoid the destitution of a needy child who lacks available resources, provided that destitution is not the result of a refusal to accept employment. The language of the statute clearly indicates that the three specified conditions were intended to serve only as restraints upon the manner in which federal funds could be disbursed by the states. To read them otherwise, as did the court below, is to distort the clear meaning of these conditions, which are preceded by a phrase which limits the expenditure of funds rather than mandates eligibility coverage.

The legislative history of § 406(e), though admittedly scanty, provides support for this construction. The Senate Finance Committee report speaks of providing "flexible and appropriate tools to accomplish these objectives," rather than imposing stringent standards upon the states.

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* The term "needy child" should not be confused with the term "dependent child." It is well settled that "dependent child" is defined by § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), as a "needy child" who meets various conditions of eligibility for Aid to Families with Dependent Children (AFDC) set forth therein. It is equally well settled that the AFDC standard of need and level of benefits is fixed by the states. *Rosado* v. *Wyman,* 397 U.S. 397 (1970). Since the determination of who is a "needy child" is necessarily a function of the level of benfits and standard of need, the definition of that term is, in effect, also the product of state discretion.

S. Rep. No. 744, 90th Cong., 1st Sess. reprinted in [1967] *U.S. Code Cong. & Adm. News* 2834 at 3002. In describin the class of recipients for whom emergency assistance was designed, the report states:

> "The eligible families involved are those with children under 21 who either are, or have recently been, living with close relatives. The families do not have to be receiving, or eligible upon application to receive, AFDC (although they are generally of the same type), but they must be without any available resources and the payment or service must be necessary in order to meet an immediate need that would not otherwise be met." *Id.* at 3003.

Interestingly enough, the report, like the statute, employs words of limitation to describe the conditions under which federal funds may be made available. Had Congress intended to provide a definition of eligibility, it is more likely that the report would have stated, in direct terms, that "All individuals lacking available resources must be eligible." When the report and statute are considered together, and in context, it is far from clear that Congress ever attempted to define the class of beneficiaries of emergency assistance. Cf. *Ohio Bur. of Employment Services* v. *Hodory*, 45 U.S.L.W. 4544, 4547 (May, 31, 1977).

If indeed Congress intended § 406(e) to serve as a mandatory eligibility standard binding upon the states, it did so by employing extraordinarily vague terms which are unwieldy in practice. Terms such as "to avoid destitution" are so very general that, as specific criteria purportedly binding the states, they fail on account of imprecision and indefiniteness. As the Court has noted,

all welfare recipients are by hypothesis "destitute," *Goldberg* v. *Kelly*, 397 U.S. 254, 261 (1970), and the general purpose of *every* public assistance program is "to avoid destitution." Congress' use of this term in § 406(a) strongly suggests that it intended to permit the states to play the major role in designing eligibility criteria.[*] For if "to avoid destitution" is viewed as a Congressionally-designed eligibility standard, that standard is essentially meaningless and its utilization for that purpose would transform emergency assistance into an open-ended program by which anyone who mismanages his income or public assistance grant would be assured of further, supplementary assistance. This is a far cry from the announced Congressional desire to provide assistance to counteract the effects of bona fide emergencies which give rise to evictions, utility termination or lack of food. *S. Rep. No. 744*, 90th Cong., 1st Sess., reprinted in [1967] *U.S. Code Cong. & Adm. News* 2834 at 3002.

In *N.Y. State Dept. of Social Services* v. *Dublino*, 413 U.S. 405 (1973), the Court was presented with the issue of whether the Work Incentive Program of the Social Security Act, which requires that certain employable public assistance recipients must register for employment, preempts work rules adopted by the State of New York. The plaintiffs contended that the State rules were more stringent than the federal statute and that since the latter provided the exclusive mechanism for establishing work rules, the State rules were invalid. In discussing the preemption issued, the Court declared:

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[*] This reasoning has been adopted by at least one federal court. In *Baxter* v. *Minter*, 378 F.Supp. 1213 (D. Mass. 1974), it was concluded that:

> "The terms 'needy' and 'destitution' were not defined by Congress and no explicit statutory standard is available for guidance. A court can infer, therefore, that Congress used general terms in the statute when describing the poverty line of eligibility because it intended the states to supply their own precise standards of need." 378 F. Supp. at 1218.

> "This Court has repeatedly refused to void state statutory programs, absent congressional intent to preempt them.
>
> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." 413 U.S. at 413.

See *De Canas* v. *Bica,* 424 U.S. 351 (1976). The Court decided that this principle had direct application to federal-state public assistance programs, such as Aid to Families with Dependent Children (AFDC), especially in light of the acknowledged fact that states:

> ". . . have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *N.Y. State Dept. of Social Services* v. *Dublino, supra,* 413 U.S. at 414.

Accordingly, the *Dublino* Court held that:

> ". . . If Congress had intended to preempt state plans and efforts in such an important dimension of the AFDC program as employment referrals for those on assistance, such intentions would in all likelihood have been expressed in *direct and unambiguous language.* No such expression exists, however, either in the federal statute or in the committee reports." *Id.* (emphasis added).

Similarly, had Congress intended to preempt the field of emergency assistance by foreclosing a state role in determining the eligibility standard, it should have clearly manifested its intention in "direct and unambiguous language," and should just as succinctly have defined both the federal standard as well as the permissible areas of discretion reserved to the states. Like the Work Incentive Program, however, "no such expression exists" in § 406(e)(1) "except in the most peripheral way." 413 U.S. at 417. Indeed, the Seventh Circuit's opinion in *Mandley* v. *Trainor,* 523 F.2d 415 (7th Cir. 1975) unwittingly supports this conclusion. Even though that court held that Congress provided obligatory eligibility criteria in § 406(e)(1), it admitted that the standards set forth were "somewhat amorphous" and incapable of precise definition. 523 F.2d at 422-423. The court, however, conveniently skirted this deficiency be declaring that "This court need not establish the exact meaning of the eligibility provision of Section 606(e) because this case requires only that the validity of the specific Illinois program be determined." 523 F.2d at 422. It is submitted, in response, that the Seventh Circuit refused to delineate the eligibility criteria which it "found" in § 406(e) because given its vague and general terms, it is incredibly difficult, if not impossible, to do so with any degree of precision. When the vague "avoidance of destitution" term of § 406(e) is combined with the fact of state discretion in defining "needy child" as well as the lack of an explicit statement indicating Congress' intent to preempt this area by restricting the states' role in fashioning eligibility standards, it becomes clear that Congress never planned to impose an eligibility standard upon the states, but that this area was to be reserved to state discretion exercisable within broadly structured guidelines. Had this been recognized by the Seventh Circuit that court would not have been faced with the dilemma of a statutory standard which it could not define.

The *Mandley* court's abdication (523 F.2d at 423) to the Secretary of Health, Education and Welfare of the responsibility for deciphering the eligibility standard of § 406(e) ignores the fact that the Secretary has, since 1969, consistently taken the position that states have the broad power to "specify the eligibility conditions imposed for the receipt of emergency assistance" as well as to "specify the emergency needs" which state plans will meet. 45 C.F.R. § 233.120(a)(1), (3). It need hardly be pointed out that the Secretary's construction of this statute "should be followed unless there are compelling indications that it is wrong. . . ." *N.Y. State Dept. of Social Services* v. *Dublino, supra,* 413 U.S. at 421 (1973); *Dandridge* v. *Williams, supra,* 397 U.S. at 481-482 (1970).

After *Burns* v. *Alcala,* 420 U.S. 575 (1975), it is clear that no special rule of construction exists by which Social Security Act eligibility provisions may be examined. Prior to *Burns,* many courts had adopted the mistaken approach that:

> ". . . persons who are arguably included in the federal eligibility standard must be deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous." 420 U.S. at 580.

Recognizing that such a rule represented a "departure from ordinary principles of statutory interpretation" unsupported by its prior decisions, the Court declared that proper analysis should proceed according to the following principle:

> "[*O*]*nce the federal standard of eligibility is defined,* a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional. The method of analysis used to define the federal standard of eligibility is no different from that used in solving any other problem of statutory construction." *Id.* (emphasis added).

Thus, a necessary first step in eligibility analysis is to isolate and define the standard of eligibility. It may not merely be presumed that an eligibility standard exists, and then further presumed that an individual is eligibile absent any language indicating exclusion. The *Mandley* court's analysis failed to follow these principles, because it nowhere defined the federal eligibility standard. Until such a definition is presented, courts which compare state emergency assistance plans against § 406(e) for the purpose of isolating possible conflicts are merely indulging in question-begging exercises. To date, neither Congress nor the courts have yet "defined" the elusive standard of § 406(e).

The *Mandley* court's holding (523 F.2d at 422) was bottomed on the Court's decisions in the line of cases which includes *King* v. *Smith, supra,* 392 U.S. 309, and *Townsend* v. *Swank,* 404 U.S. 282 (1971), each of which hold that, by virtue of § 402(a)(10) of the Act, 42 U.S.C. § 602(a)(10), federal participation in state AFDC programs is conditional on the state's offering benefits to all persons who are eligible under federal standards. Thus, all individuals who meet the federal definition of "dependent child," § 406(a) of the Act, 42 U.S.C. § 606(a), and who are "needy" under state standards, must be granted AFDC benefits according to § 402(a)(10). See *Burns* v. *Alcala,* 420 U.S. 575, 578 (1975). For instance, when Alabama attempted to deny AFDC assistance by expanding the definition of "parent" to include any male living in the household, *King* v. *Smith, supra,* and when California broadened the concept of "parent" to include a "male assuming the role of a spouse," *Lewis* v. *Martin,* 397 U.S. 552 (1970), the Court had little difficulty in striking them down. Likewise, it struck down an Illinois regulation denying AFDC to otherwise eligible students who attended college, *Townsend* v. *Swank, supra,* and similarly disapproved of the California policy which specified that a father absent from the home on account of military service was not "continuously absent" for the purpose of § 406(a). *Carleson* v. *Remillard,* 406 U.S. 598 (1972).

These holdings are inapplicable here, however, since § 402(a)(10) by its very terms is not broad enough to encompass § 406(e), and "there is no parallel requirement in the statute that emergency assistance—whose definition and funding provisions are entirely separate from those of AFDC—be paid to all eligible individuals." *Williams* v. *Wohlgemuth, supra,* 540 F.2d at 169. Thus, contrary to the *Mandley* court's conclusion, it may not be gainsaid that the *Townsend* line of cass, by themselves, require a holding that a state must provide emergency assistance to all persons facing an emergency, regardless of its cause. *Williams* v. *Wohlgemuth, supra,* 540 F.2d at 169.

> "Such a broad-based eligibility standard does not appear to have been imposed upon the states expressly by the statutory amendments creating the emergency assistance program." *Id.*

For similar reasons, the so-called Townsend regulation, 45 C.F.R. § 233.10(a)(1)(ii), which is merely the HEW codification of the holding in *Townsend* v. *Swank,* is also inapplicable to the instant case. This regulation, relied upon in both *Mandley* (523 F.2d at 421) and *Williams* v. *Wohlgemuth, supra,* 540 F.2d at 170, provides:

> "(ii) A State may:
>
> (A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorized more limited coverage;" 45 C.F.R. § 233.10(a)(1)(ii)(A).

It is submitted that the *Burns* principle is just as applicable to this regulation as it is to the *Townsend* holding. Thus, before a state may limit "coverage," it must be determined that the federal statute, in the first instance, does indeed provide coverage through a defined eligibility standard. Again, no such standard has yet been defined or identified because none exists.

Aside from the fact that § 402(a)(10) is unrelated to § 406(e), there is an even more basic reason why the *King-Townsend* holdings should not be extended to the area of emergency assistance. The *King-Townsend* cases recognize that the state fiscal resources appropriated for public assistance are finite and that whether those limited resources will provide effective assistance to needy people is a function of both the breadth of the class of eligible recipients, as well as the existing standard of need and level of benefits paid. In allocating their limited funds to expanding caseloads, the states, as a result of these holdings, are precluded from reducing the number of families eligible for assistance. Thus, adjustment of the standard of need and level of benefits paid is the only means by which states may operate programs such as AFDC within the limitations imposed by their budgets. While such a benefit reduction risk, resulting in a lesser amount of benefits per capita being received by a greater amount of recipients, may be acceptable in AFDC, it is unrealistic when applied to emergency assistance. For if states must thinly spread their limited funds among all those who are "destitute" and "without available resources," the result will surely be that no recipient will receive enough to begin to alleviate his emergency circumstances, a situation which can hardly be said to have been within Congress' contemplation. Moreover, given the choice of an "all or nothing" adoption of a federal emergency program, "states willing to adopt the program in partial form might choose to forego it entirely," as at least one state apparently has done. *Lupu, Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion,* 57 B.U.L. Rev. 1, 22 (1977). Because of the limited nature of the emergency assistance program, this risk of benefit reduction posed by the rigid imposition of vague eligibility criteria is much greater for emergency assistance than for basic AFDC. *Id.*

In summary, the language of § 406(e), which after all exists solely as a definition of emergency assistance for the purposes of § 403(a)(5), a funding provision, does not explicitly mandate that any particular class of individuals shall be eligible for emergency aid. All the section does is to provide general guidelines within which federal funds may be spent by the states. Most importantly, it does not require or even encourage the states to spend such funds up to the outer limits of those guidelines. Rather, implicit in both § 403(a)(5) and § 406(e) is that state discretion will be exercised to design a program of emergency assistance tailored to the specific needs of the local populace. The Secretary of Health, Education and Welfare has endorsed this construction from the outset, and no definitive proof, whether by statute or legislative history, indicates that Congress intended otherwise.

CONCLUSION

It is respectfully submitted that the Court of Appeals erred by holding that § 406(e) contains a federal standard of eligibility. Proper construction of § 403(a)(5) and § 406(e) warrants a finding that no federal eligibility standard exists but that such matters were reserved to state discretion. Wherefore, the decision below should be reversed.

Respectfully submitted,

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In the
Supreme Court of the United States

October Term, 1976

Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, Acting Director,
ILLINOIS DEPARTMENT OF PUBLIC AID, et al.,
Petitioners
v.
VENUS MANDLEY, Individually and on Behalf of
All others Similarly Situated,
Respondents

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION AND WELFARE,
Petitioner
v.
VENUS MANDLEY, Individually and on Behalf of
All Others Similarly Situated,
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ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Amicus Curiae Brief of the Commonwealth of Massachusetts

Interest of the Amicus

The Commonwealth of Massachusetts submits this amicus curiae brief to reinforce the position of the states of Illinois, New Jersey, Pennsylvania, and the United States Department of Health, Education, and Welfare that federal law permits the states wide discretion to determine eligibility criteria and set benefits levels applicable to the Emergency Assistance program authorized by title IV-A of the Social Security Act. Massachusetts operates a wide-ranging set of social welfare programs, the expenditures for which account for approximately 25 per cent of its annual budget. In recent years, its ability to control welfare costs has diminished substantially. Not only have large programs like Medicaid and AFDC experienced substantial cost escalation, but the lower federal courts have determined with increasing frequency that federal law restricts significantly — and expensively — one aspect or another of the states' traditional discretion to administer their welfare programs. The Commonwealth believes that furtherance of the national interest in the social welfare area depends upon proper recognition of the importance of state discretion and that its Emergency Assistance program provides a good example of the distortion which erroneous interpretations of the Social Security Act can introduce into the operation of state welfare systems.

The Commonwealth began participating in title IV-A's Emergency Assistance program in 1968. The program was designed to meet the immediate needs of applicants for public assistance and respond to emergencies which recipients and non-recipients might experience (e.g., fire, eviction, utility terminations, etc.). The program provided a wide range of benefits, ranging from cash assistance to emergency shelter to social services counselling. Rising costs, related perhaps to alterations in other assistance programs as well as the general economic inflation, forced the Commonwealth to impose limitations on the amount of certain benefits (e.g., payments for rent and utility arrearages). Invalidation of these limitations in *Ingerson* v. *Sharp*, 423 F. Supp. 139 (D. Mass. 1976), *appeal argued* May 3, 1977, caused the Commonwealth to withdraw temporarily from the Emergency Assistance program. While Massachusetts has renewed its participation, its Department of Public Welfare is considering various ways to restructure emergency assistance to meet the District Court's requirements, achieve program objectives, and maintain costs within budgetary limits. The Commonwealth's continued ability to provide emergency assistance under title IV-A may depend upon whether this Court rejects the course which the lower federal courts have taken and interprets the Act to permit the states broad latitude in the operation and funding of their emergency assistance programs.

Argument

THE SOCIAL SECURITY ACT DOES NOT IMPOSE A FEDERAL ELIGIBILITY STANDARD FOR THE EMERGENCY ASSISTANCE PROGRAM UPON THE STATES.

I. *Section 406(e)(1) Is Merely A Limitation Upon The Secretary Of The Treasury's Duty To Reimburse The States For Expenditures As Emergency Assistance Imposed By Section 403(a)(5).*

Proper interpretation of the Social Security Act (Act) depends upon careful observation of its architecture. Although Congress has amended the statute often and substantially since its passage in 1935, its structure has exhibited remarkable endurance. Title IV-A of the Act, codified as subchapter IV, part A, §§ 601-610, of the United States Code, exhibits the now classic style of the Act's draftsmen: § 401 embodies a subsidiary statement of purpose and authorizes appropriations for payments to the states; § 402 establishes state plan requirements and directs the Secretary of Health, Education, and Welfare (HEW) to approve plans which meet these requirements; § 403 requires the Secretary of the Treasury to reimburse the states for certain portions of their expenditures as, among other things, "emergency assistance"; § 404 requires the Secretary of HEW to suspend payments after notice and hearing (the so-called "conformity hearing") upon a determination that a state has effected unlawful modifications in its state plan or has failed to administer it in substantial compliance with the state plan requirements contained in § 402; and § 406 provides definitions of selected terms, including "emergency assistance." Appreciation of this framework, replicated in the structure of other contemporaneous titles[1] and mirrored in that of more recent enactments,[2] provides a firm foundation for sound judicial interpretation.

The lower federal courts agree that the states are not required to operate emergency assistance programs. E.g., *Williams* v. *Wohlgemuth*, 540 F. 2d 163, 165 (3d Cir. 1976); *Mandley* v. *Trainor*, 523 F. 2d 415, 418 (7th Cir. 1975). This result follows from a review of § 402(a): the term "emergency assistance" does not appear in it, and § 402(a) is the only section in title IV-A of present concern which imposes requirements upon the states. *Williams* v. *Wohlgemuth*, *supra* at 165, n. 3. The term "emergency assistance" does appear, however, in § 403 in the following context:

> (a) From the sums appropriated therefore, the Secretary of the Treasury shall (subject to section 1320b of this title) pay to each state which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958 —
>
> . . . .
>
> (5) in the case of any State, an amount equal to 50 per centum of the total amount expended under the State plan during such quarter *as emergency assistance* to needy families with children [emphasis supplied].

This provision of § 403, considered without reference to the definition contained in § 406(e)(1), would have the following narrow and specific effect: to require the Secretary of the Treasury to reimburse the states for 50 per cent of their expenditures "as emergency assistance," a potential liability of undefined but presumably substantial dimensions. And that is all it would do. Absent § 406(e)(1) or valid HEW regulations, the Commonwealth submits that § 403 (a)(5) could not support any of the interpretations with which the lower federal courts would embellish its simple lines. See, e.g., *Williams* v. *Wohlgemuth*, *supra*, at 168-69; *Mandley* v. *Trainor*, *supra*, at 420.

Congress, however, was aware of the need to limit the federal government's obligation to pay for "emergency assistance." Moreover, it conceived of the program as one designed to solve rather specific problems. See e.g., S. Rep. No. 744, 90th Cong., 1st Sess. 165, *reprinted in* [1967] U.S. Code Cong. & Admin. News 2834, 3002-04 (states need ability to provide immediate assistance in crisis without necessity for usual AFDC determinations and payment procedures). The logical and traditional tool of legislative design which the draftsmen used both to limit financial liability and guide states in the structuring of their programs was the definition.[3] It is these two purposes, and only these, which the Commonwealth submits Congress intended § 406(e)(1) to serve.

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[1] E.g., titles VI, X, and XIV.

[2] E.g., titles XIX and XX.

Section 406(e)(1) defines the term "emergency assistance" appearing in § 403(a)(5) as follows:

> (e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment —
>
> (A) money payments, payments in kind or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and
>
> (B) such services as may be specified by the Secretary;

---

[3] See R. Dickerson, The Fundamentals of Legal Drafting, chs. 5 & 7 (1965).

> but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance. . . .

Like the Act, analyzing the structure of this definition is the best way to understand its meaning. The operative language begins in the second line with the words "any of the following . . .," but, like much modern architecture, considerations of form immediately succumb to functional demands: Congress, most concerned with financial liability, immediately introduces limitations upon the Secretary of the Treasury's duty to reimburse the states by determining what "emergency assistance" *is not* and *excluding* from the meaning of "emergency assistance," among other things, state payments furnished for a period in excess of 30 days in any 12-month period, state payments furnished to others than needy children under 21 living with certain relatives who have no available resources and for whom assistance is necessary to avoid destitution, and state payments furnished to children whose destitution is a result of their or their relatives' failure to accept employment. Only after this primary concern is satisfied does the definition proceed to state what "emergency assistance" *is*:

> (A) money payments, payments in kind, or such other payments *as the State agency may specify* with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and
>
> (B) such services as may be specified by the Secretary . . . [emphasis supplied].

Thus, paragraph A defines "emergency assistance" to require the Secretary of the Treasury to reimburse "money payments, payments in kind, or such other payments as the State agency may specify . . .," provided only that the expenditures are not made in violation of subdivision (1)'s introductory limitations and, of course, are made "as emergency assistance" under an approved state plan.

One observes the structure of this definition without finding a basis for asserting that it imposes a federal eligibility standard. Such invisibility is surprising, for good architecture is generally quick to proclaim its purposes.[4] The Commonwealth believes that the preferable, indeed elegant, explanation for the absence of language imposing a federal standard is that Congress did not intend to subject the states to one. Any other view must struggle against the discretionary language in paragraph A (emphasized in the reproduction above), the placement of the program's sole authorizing language in § 403 rather than § 402, and Congress's concept of the program as a flexible, voluntary source of financial assistance to the states. The Commonwealth maintains that such a challenge to the Act's structure is unwarranted under any acceptable theory of interpretation and that the reason the lower federal courts have undertaken it stems from an unfortunate misunderstanding of this Court's decisions under § 402(a)(10) of the Act, as the argument in the following section demonstrates.

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[4] See generally, L. Sullivan, The Tall Office Building Artistically Considered, Lippencott's Magazine (March, 1896) (containing the statement which represents a fundamental premise of modern architecture that "Form ever follows function").

II. *The Lower Federal Courts Have Mistakenly Applied This Court's Decisions Under § 402(a)(10) To Cases Involving The Emergency Assistance Program.*

Almost ten years ago, this Court began developing novel federal common law under the Social Security Act. The progenitor of what is now a respected lineage was Mr. Chief Justice Warren's opinion in *King* v. *Smith*, 392 U.S. 309 (1968), which gave birth to the concept of federal eligibility standards for federally supported, state administered welfare programs. *King's* crucial holding, for present purposes, appears at page 317:

> The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW. 49 Stat. 627, as amended, 42 U.S.C. § 602 (1964 ed., Supp. II) . . .
>
> One of the statutory requirements is that "aid to families with dependent children . . . *shall be furnished* with reasonable promptness *to all eligible individuals* . . . ." 64 Stat. 550, as amended, 42 U.S.C. § 602(a)(9) (1964 ed., Supp. II). As noted above, § 406(a) of the Act defines a "dependent child" at one who has been deprived of "parental" support or care by reason of the death, continued absence, or incapacity of a "parent." 42 U.S.C. § 606(a) (1964 ed., Supp. II). *In combination these two provisions of the Act clearly require participating States to furnish aid to families with children who have a parent absent from the home, if such families are in other respects eligible* . . . [emphasis supplied].

As the Chief Justice went on to reiterate and later cases emphasized, states may not define terms used to determine eligibility for AFDC benefits in a manner which results in the denial of benefits to persons whom the Act renders eligible and, through § 402(a)(10), requires states to provide assistance. *King* v. *Smith*, *supra*, at 333. *Burns* v. *Alcala*, 420 U.S. 575, 578 (1975); *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971).

Appreciation of the Act's structure leads to an understanding of the source of the lower courts' error. Section 402 is the section which imposes obligations upon the states. However, its provisions generally do not govern the emergency assistance program. In particular, subdivision 402(a)(10), the source of *King* and its progeny, does not apply to emergency assistance. *Williams* v. *Wohlgemuth*, 540 F. 2d 163, 169 (3d Cir. 1976). Hence, as the Third Circuit but not the Seventh has determined, this Court's decisions descended from *King* do not justify the interpretations of §§ 403(a)(5) and 406(e)(1) which the lower federal courts have reached. *Williams* v. *Wohlgemuth*, *supra*, at 169; *contra*, *Mandley* v. *Trainor*, 523 F. 2d 415, 422 (7th Cir. 1975). Moreover, as previously argued, observation of the statute's architecture obviates the need to review extrinsic evidence of Congressional intent and leads to the conclusion that Congress did not intend to impose federal eligibility standards upon state emergency assistance programs. Therefore, this Court should decide that states are free to determine eligibility criteria for their emergency assistance programs which they conclude are best suited to their individual situations.

Conclusion

For the reasons set forth above, the Court should reverse the Seventh Circuit's decision and declare that the Social

Security Act does not impose a federal eligibility standard for the emergency assistance program upon the states.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

Nos. 76-1159 and 76-1416

ARTHUR F. QUERN, DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL., *Petitioners,*

vs.

VENUS MANDLEY, ET AL., *Respondents.*

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *Petitioner,*

vs.

VENUS MANDLEY, ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Motion for Leave to File Brief and Brief Amici Curiae for

United Way of Metropolitan Chicago (Formerly Council for Community Services in Metropolitan Chicago), Jewish Family and Community Service, Common Pantry, Women's International League for Peace and Freedom—Chicago Branch, Jane Addams Center (a Hull House Affiliate), Operation Push (People United to Save Humanity), the American Red Cross—Mid-America Chapter, Travelers Aid Society of Metropolitan Chicago, Hull House Association, Juvenile Protection Association, Japanese American Service Committee, the Lakeview Pantry, Afro-American Family and Community Services, Lutheran Welfare Services of Illinois, South Chicago Community Services, and Cathedral Shelter of Chicago.

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The sixteen above-named private social service agencies, which are actively engaged in the Chicago Metropolitan area in charitable social service work, respectfully move for leave to file a brief *amici curiae* in support of the respondents. The Solicitor General and the respondents consented to the filing of this brief, but the Illinois petitioners declined to do so. These *amici** previously filed briefs with the court of appeals and the district court supporting the positions of respondents and the interest of these *amici* in the case remains unchanged.

These *amici* have been seriously and adversely affected by the actions of the Illinois petitioners in denying emergency assistance to many distressed and impoverished families contrary to the decisions of the court of appeals in this case on September 25, 1975 (523 F. 2d 415) and on November 23, 1976 (545 F. 2d 1062) known as Mandley I and II. To circumvent Mandley I, the Illinois petitioners, with the support of petitioner, United States Department of Health, Education and Welfare (HEW), changed the name, but not the substance, of emergency assistance in Illinois and, on the basis of that change persuaded the district court to dismiss the case as moot. That dismissal was reversed in Mandley II, and, pursuant to its mandate, the district court entered a judgment for the respondents but has declined to enforce it pending this Court's decision. Illinois still has only a restricted emergency assistance (now termed "special assistance") program for some but not all causes of emergency, rather than a comprehensive program for all such emergency causes as required by Mandley I and II.

Eligible families under the Social Security Act who are denied emergency assistance by Illinois frequently turn to private charities for such aid, placing a heavy burden on them. The brief of the *amici curiae* will contend that, in restricting its emergency assistance program and in circumventing the mandate of the court of appeals, the Illinois respondents, with the support of HEW, have caused an illegal shift to private charities and social service agencies, such as these *amici*, of a significant portion of its responsibility under the Social Security Act for emergency assistance to needy families with children.

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* Together with one social service agency which has subsequently ceased functioning.

For the foregoing reasons, we respectfully submit that the motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE.

The interest of these *amici curiae* is set forth in their annexed motion for leave to file this brief.

STATEMENT OF FACTS.

The restricted Illinois emergency assistance program, which the court of appeals held to be illegal, but which Illinois petitioners continue to operate under a different name, has adversely affected the operations of private social service agencies. Many families which would have received emergency assistance prior to the fall of 1973 when the restricted Illinois program began, have been obliged to turn to private social service agencies for help. The shift of responsibility for such emergency assistance to private social service agencies has seriously burdened the limited resources of the agencies. Many of them are not normally equipped to provide food, clothing, shelter and household supplies needed to meet emergencies. The increased demand on these agencies to provide such basic subsistance for AFDC participants and other needy families has diverted the agencies' energies and resources from their normal programs of service. Such diversions may jeopardize their receipt of contributions in the future since many donations are intended for the specific purposes of these agencies. Even pantries which normally provide food have been so pressed in meeting emergency needs that they have run out of supplies and have been forced to ration their distributions.

ARGUMENT.

1. Section 406(e)(1) Does Not Permit a State Receiving Payments for Emergency Assistance to Give Aid for Some Causes of Emergency But Not for Others, as Illinois Has Done.

The express language of § 406(e)(1) places no limitation upon the causes of emergency for which assistance is to be available. The stated purpose of this aid is "to avoid destitution of such child". The cause of an emergency has no bearing on the child's need when the family has suffered a sudden personal financial crisis. Therefore, it was the relief needed and not the cause of the emergency on which Congress focused.

The last three specified limitations on emergency assistance stated in § 406(e)(1) (in addition to being under the age of 21 and living with a specified relative in the latter's home) relate entirely to the child's actual and potential financial situation. These are:

(a) the "child is without available resources";

(b) "the payments * * * are necessary to avoid destitution"; and

(c) the destitution did not arise from a refusal without good cause of employment or training for employment by the child or his relative.

However, no eligibility differentiation based on the cause of the emergency is expressed in the statute, nor is there an explicit delegation of authority to HEW or the individual states to make such distinctions. It would be illogical to infer, as petitioners suggest, power in the states to impose additional arbitrary limitations on eligibility which Congress did not expressly authorize. The language of § 406(e)(1), being so specific in listing eligibility restrictions, necessarily excludes any others and impels the conclusion that the additional eligibility restrictions imposed by Illinois were illegal. *King* v. *Smith*, 392

U. S. 309 and *Townsend* v. *Swank*, 404 U. S. 282. See also *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (CA 3, 1976) at 169.

It may also be noted that in specifying eligibility requirements in § 406(e)(1), Congress designated no fault of the child or his relative, other than a refusal to work or train for work, as a ground for denying emergency assistance. Thus, by a process of exclusion Congress showed its intent that the fault of a child (such as negligence) is not a restriction on eligibility. Congress knew how to limit this kind of aid, as it demonstrated with the refusal to work limitation on eligibility. This leaves the strong implication that if it had intended to permit the states to impose additional restrictions based on the cause of the emergency, it would have done so expressly. Its silence on this is eloquent.

The legislative history of § 406(e)(1) points in the same direction. Pertinent committee reports and statements of officials to Congress cited in the briefs of the parties contain no suggestion of a congressional intent that relief should be allowed for some emergencies but not others, or that HEW or the individual states should have any discretion to allow relief from emergencies resulting from some causes but not others. Instead, this legislative history shows that Congress intended that all types of emergency should be covered.

The petitioners and their supporting *amici*, New Jersey and Massachusetts, fear the added expense of granting emergency assistance unrestricted by the states. However, any state, such as Illinois, which may be unable or unwilling to pay its one-half share of the cost has three financial safety valves: the state may drop *all* federally funded emergency assistance; or, it may reduce *all* emergency assistance to *all* victims to the level desired; or, it may adopt a purely state financed plan. Otherwise, under the principle of *Townsend* v. *Swank*, 404 U. S. 282, it must furnish emergency aid to all victims equally, subject only to the express limitations stated in § 406(e)(1). If Illinois wishes to accept social security benefits it must do so on the terms Congress has specified as to eligibility. It may not favor some federally eligible victims at the expense of others. As Mr. Justice Cardozo, speaking for this Court, said in *Helvering* v. *Davis*, 301 U. S. 619, at p. 645:

> "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. Constitution, Art. VI, Par. 2."

2. Illinois Cannot Ignore the Broad Eligibility Requirements Established By Congress for Emergency Assistance By Changing the Name of Its Program to "Special Assistance".

If this Court agrees that Illinois cannot maintain an emergency assistance program eliminating aid to persons meeting the eligibility requirements of § 406(e)(1), then it follows that a change of name to "special assistance" does not make this program more palatable. HEW admits (br., p. 6) that the new Illinois eligibility restrictions and coverage limitations are "essentially identical to those of the terminated EA program". The Illinois petitioners state (br., p. 8) that their new "special assistance" program affords "virtually identical relief as was provided under the § 406(e) program." Thus, there is complete agreement by the parties that after Mandley I the Illinois petitioners, with HEW's blessing, sought to sidestep that decision by this change of name.

The novel argument for dual statutory authority for emergency assistance, made by both the federal and Illinois petitioners, *i.e.*, that such aid is authorized under *either* the emergency assistance provisions of § 406(e)(1) and funded under § 403(a)(5) *or* the AFDC "special needs" regulation purportedly funded under § 403(a)(1), appears to be an afterthought. Nowhere in petitioners' briefs is it asserted that this concept was ever before expressed by HEW in its regulations or in any other public statement or brief. Nor are we aware of any such contention previously made by Illinois.

The AFDC "special needs" regulation has been used in various state programs approved by HEW to cover unusual expenditures, which ordinarily do not involve any emergency. Typical special circumstance items in numerous state plans are: special diets; allowance for pregnancy, medical expense, prosthetic devices, telephone installation, school expenses, travel costs for health care, guardianship fees, medical insurance, TB sanitarium expenses.

The HEW 1974 edition of "Characteristics of State Plans for Aid to Families with Dependent Children Under the Social Security Act, Title IV-A" lists only five states, California (p. 19), Hawaii (p. 50), North Dakota (p. 147), Rhode Island (p. 171) and Wisconsin (p. 215), supplying assistance under the heading "special circumstances items" which include any listed expenses of an emergency nature. Such emergency items appear incidental to other special items rather than parts of a comprehensive emergency assistance program. No other states so listed by HEW as providing "special circumstance items" include any items of an emergency character.

HEW concedes (br. p. 16) that it has never defined "special need items". Also, it tacitly admits that it never expressly claimed that such items could properly include "emergency assistance" when it asserts (br. p. 16) that "it has been well understood that the term includes benefit payments designed to meet emergency needs." HEW does not state who had such an understanding and there is nothing in the record to explain this statement. At most it must have been an administrative secret.

HEW's quoted statement (br. p. 16) from the Handbook of Public Assistance Administration, Part IV, § 3131(3) dated July 6, 1966 and the section in which it appears make no mention of "emergency assistance". Instead "emergency situations", and "federal participation" in payments to meet them, are covered in another section of the Handbook, Part IV, § 3434.2 dated December 10, 1962, long prior to the 1968 "emergency assistance" amendments to the Social Security Act now found in § 406(e)(1). The "emergency situations" mentioned in § 3434.2 are not described in § 3131.3 as categories of "special needs". Instead, they stand on their own feet as "emergency" payments and were superseded necessarily by the subsequent provisions of § 406(e)(1) giving congressional directions for the first time as to emergency assistance. The statute takes precedence over the prior administrative directions, particularly as to the new broad eligibility standards of § 406(e)(1). Neither Handbook section suggests that the broad eligibility provisions of § 406(e)(1) can be avoided by listing emergency assistance under "special needs". Illinois is the first state, so far as we know, to attempt to transfer an identical restricted program from the emergency assistance provisions of § 406(e)(1) to a "special needs" provision of its regular AFDC program, whether to evade the broad eligibility provisions of § 406(e)(1) or for any other purpose.

Petitioners claim that the adoption of the emergency assistance amendments by Congress did not repeal the authorization for "special need" allowances under the regular AFDC programs. Yet it seems evident that Congress intended that all emergency assistance programs, however designated, should be provided solely under the eligibility requirements of § 406(e)(1). Thus, the Illinois emergency assistance program held illegal in Mandley I cannot be justified by simply relabeling it as "special needs". Even though renamed the program is for emergency assistance and therefore must necessarily be controlled by § 406(e)(1) as to eligibility. If the Illinois program was illegal as held in Mandley I, then it remained equally illegal under the new "special needs" heading. There could be no more apt place for the use of the equitable precept that equity looks through form to substance.

3. The Relief Granted by the Court of Appeals Is Appropriate and, if Compliance with the Court's Interpretation of § 406(e)(1) Is to Be Achieved, It Was Necessary.

HEW complains (br. 35-6) that the relief granted by the court of appeals was too broad in that it applies nationwide by requiring HEW "to promulgate regulations in accordance with the court of appeals' opinions" even though respondents could be protected by "statewide relief". It does not explain how such a segregation of relief could be accomplished. Obviously some new HEW regulation must be issued to attain compliance with Mandley I and II, if this Court decides to affirm the latter. The court's interpretation of the statute is not self executing. Even now HEW does not propose willing compliance, should this Court approve this interpretation. Indeed it suggests the opposite by asking that respondents be limited to relief solely within Illinois, apparently to leave HEW free to follow a contrary interpretation in all other states. Whatever the proper construction of the statute may be, it should be applied equally in all states, and HEW and the individual states with emergency assistance programs should give all persons the same benefits of the statute.

HEW urges (br. 37) that national application of the statute, as held in Mandley I and II, would force states paying emergency assistance benefits to either enlarge their benefit programs or terminate them. This choice is conferred by Congress, but there is no evidence in the record to support the likelihood of a widespread withdrawal from emergency assistance by the states now providing it. Illinois, for one, has so far refused to abandon it, resorting instead to attempted statutory manipulation. We understand that the total cost of emergency assistance in Illinois before it was illegally reduced in 1973 had been only about $2,500,000 a year of which one-half was funded by HEW—a tiny percentage of the state's total welfare expense.

The courts having the responsibility for construction of the Social Security Act must require compliance with their interpretation on an equal basis throughout the nation. In the light of Illinois' and HEW's attempt to circumvent Mandley the relief granted in Mandley II seems minimal to achieve compliance by them with the courts' decisions.

4. There Was No Intent by Congress to Permit States to Transfer Part of Their Responsibility for Emergency Assistance to Charities and Social Service Agencies.

Illinois, in denying aid to emergency victims through improper restrictions on eligibility, knows that charities and social agencies, like these *amici*, are strongly impelled to aid them because of their helplessness, even at the expense of their own normal social and charitable functions. Often Illinois public aid offices, unable to help them under state programs, send victims of emergencies to private agencies for aid. These charities may then be obliged to choose between aiding them through diverting their own funds and personnel from their established purposes or turning away these helpless persons.

The congressional hearings, debates and reports on the emergency assistance program do not contain any language which indicates that private charity was to assist the state and federal governments in providing emergency assistance after a state had decided to participate in the emergency assistance program. Instead, the legislative history of the emergency assistance program indicates that once a state makes the determination to participate in the emergency assistance program, it must provide assistance to all persons eligible under § 406(e)(1).

Likewise, the Illinois Public Aid Code contains no language expressly or impliedly shifting any part of the burden for emergency assistance to private persons or charitable agencies. See Ill. Rev. Stats. (1975) Chap. 23, § 1-1 *et seq.* and, particularly as to emergency assistance, § 12-8. Both the federal and Illinois lawmakers intended that only the state (aided with federal money) and not private charities would provide emergency assistance.

The impact on private eleemosynary organizations of welfare regulations in determining the legality of the regulations is a proper concern of the courts. *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, 264 (1974). See also *Adens* v. *Sailer,* 312 F. Supp. 923, 925 (E. D. Pa., 1970). In both cases the welfare regulations complained of were struck down. They strongly suggest that petitioners' attempt to shift the burden of emergency assistance to private agencies, and the poor themselves, violates both federal and state welfare policy.

Both Congress and the courts have found that a major purpose of the Social Security Act is to provide for the security of dependent children. *King* v. *Smith,* 392 U. S. 309 (1968). In only providing for a limited number of emergency situations, the Illinois petitioners violate the welfare policy embodied in the Social Security Act that the federal and state governments should provide for basic and emergency needs of the poor. Moreover, the Illinois petitioners in directing those in need to request assistance from private social agencies, such as the *amici curiae,* for emergencies not compensated by the Illinois emergency assistance program, place an undue burden on those organizations.

Evidence was adduced at the trial on the adverse impact of Illinois' restricted emergency assistance program. Witnesses testified that their organizations had experienced increased requests for aid from indigent persons since the implementation of the restricted program. The inability of the private social service agencies to provide for the emergency needs of needy families and their children was also shown by testimony during the trial. Private agencies are not equipped with the financial resources to meet the demands of all those persons in need who are forced by the Illinois petitioners to seek relief from such agencies since the limited financial resources of the agencies are largely required for other social purposes, such as day care centers, family therapy, legal aid, child counseling, job training programs and education courses. The restricted emergency

assistance program continues to put pressure on the social service agencies to divert resources for emergency needs and consequent disruption of their regular programs.

CONCLUSION.

The decision of the court of appeals should be affirmed.

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September, 1977.

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